83 - 1375

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

GLORIA D. AKIN AND
TED M. AKIN, PETITIONERS

V.

GEORGE L. DAHL, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Petitioners, pro se,

Gloria D. Akin and
Ted M. Akin
5323 Dentwood
Dallas, Texas 75220
(214) 368-4246
(214) 749-6464

Of Counsel,

R. Reynolds Messall
Richardson, Texas

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

QUESTIONS PRESENTED

1. Whether there is a penalty and chill on free expression and the right of access to the courts in violation of the first and fourteenth amendments where a state applies common law rules relating to malicious prosecution to determine that lack of probable cause may be based on a mere inference that a defendant did not make full and fair disclosure of facts known to the defendant in commencing guardianship and temporary hospitalization proceedings.

2. Whether there is a penalty and chill on protected speech in violation of the first and fourteenth amendments where a state holds a defendant liable for malicious prosecution without a specific finding that a defendant's speech was knowingly false or in reckless disregard of the truth.

3. Whether, in the circumstances of this case, there is a subsequent penalty resulting in a chill on the right of petition, a penalty for the exercise of the right of freedom of speech and a violation of due process where a state court awards actual and punitive damages in the amount of $1,190,000 in a common law malicious prosecution case arising from the commencement of statutorily governed guardianship and temporary hospitalization proceedings.

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MISCELLANEOUS

Opinions Below

Concerning the malicious prosecution case presented here for review on first and fourteenth amendment claims, the opinions below are Dahl v. Akin, 645 S.W. 2d 506 (Tex. Civ. App.-Amarillo 1982), 27 Tex. Sup. Ct. J. 23 (October 8, 1983), reh. den., November 23, 1983. In the opinion found at 645 S.W.2d 506, the Texas Court of Appeals also considered claims between the parties unrelated to malicious prosecution.

Concerning the guardianship proceedings underlying Respondent's action for malicious prosecution , the opinion below is In Re Guardianship of Dahl, 590 S.W. 2d 191 (Tex. Civ. App.-Amarillo 1979, writ ref'd n.r.e.).

Jurisdiction

This Petition asserts that the Texas Supreme Court enunciated common law rules relating to malicious prosecution that penalize Petitioners and chill future litigants in the right of access

to the courts and the right of free expression, and deny these Petitioners due process of law. Jurisdiction exists under 28 U.S.C. § 1257(c). Judgment by the Texas Supreme Court was rendered October 5, 1983, at 9:00 A.M. Timely motion for rehearing was denied November 23, 1983. This Petition is filed within 90 days thereof, since leave to file a second motion for rehearing was denied.

Constitutional Provisions

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. U.S. CONST. amend. I.

> All persons born or naturalized in the United States . and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

a. Procedural History; b. Nature And Circumstances Of The Alleged Malicious Prosecution.

a. Procedural History

The Dallas County District Court, Dallas, Texas, entered judgment on a jury verdict against these Petitioners. The verdict assessed actual and exemplary damages against the Petitioners for malicious prosecution. The amount was 1.19 million dollars, after remittitur. The Texas Court of Appeals and the Supreme Court of Texas affirmed.

In 1978, Respondent filed this lawsuit against Petitioners, who are his only daughter and her husband. Throughout the original and amended petitions, Respondent alleged that the Petitioners had used falsehoods to invoke temporary

hospitalization and guardianship proceedings against him. He specifically charged that Petitioners had brought the proceedings with words and acts that were knowingly false or that were said and done with reckless disregard for the truth concerning the Respondent's mental and physical health. He also alleged that they had conspired in the alleged malicious prosecution.

Petitioners' answer properly denied these and all allegations.

At trial, no issue was submitted to the jury concerning specific testimony or statements that were supposedly false. Nor was there an issue relating to the knowing falsity of any testimony or statements that were purportedly made with a purpose to wrongfully hospitalize and seek a guardianship for Respondent.

The jury was permitted to decide the issue of lack of probable cause, deciding it against Respondent's daughter. The jury likewise found that she

acted with malice. Although no issue was submitted concerning the lack of probable cause or a mens rea possessed by Respondent's son-in-law, the jury was allowed to conclude that a conspiracy existed and to assess exemplary damages against Respondent's son-in-law. The Petitioners were made jointly and severally liable.

In the trial court, Petitioners' counsel raised and argued numerous points establishing this Court's jurisdiction of this case, including the following:

(1) That the issue of probable cause should not be submitted to the jury (A 81),

(2) That a finding for Respondent would constitute a chill on the right of free access to the courts (A 82),

(3) That no evidence was introduced, nor a finding made, that Petitioners made less than honest and full disclosure in commencing the earlier

proceedings, and therefore that the jury findings relating to probable cause could not be sustained and that probable cause must be found as a matter of law (A 83),

(4) That certain jury findings including the findings of malice, and lack of probable cause, should be disregarded, and that the trial court erred in refusing one of Petitioners' requested instructions (A 88), and

(5) That a new trial should be granted on the basis of the improper entry of judgment. (A 90).

Among numerous arguments to the Court of Appeals, Petitioners' briefs and motion for rehearing contended the following points which give this Court jurisdiction of this case:

(1) That the right of access to the courts was involved (A 93),

(2) That without evidence and a finding that Petitioners made less than honest and full disclosure in commencing

the earlier proceedings, the finding of a lack of probable cause could not be sustained and probable cause was established as a matter of law (A 95), and

(3) That on rehearing, the Court of Appeals' opinion had a chilling effect on the right of petition as gives rise to the right of access to the courts (A 98).

All arguments in the form of points of error, were preserved and presented to the Texas Supreme Court. Petitioners submitted a separate brief detailing the law concerning probable cause. In the Texas Supreme Court Petitioners raised the following points establishing federal jurisdiction:

(1) That the decision resulted in a chill on the use of the courts (A 99),

(2) That probable cause existed as a matter of law and, in light of Respondent's failure to offer any proof to show that Petitioners had made

falsehoods of any sort in commencing the prior proceedings and that record failed to support the finding of lack of probable cause (A105), and

(3) That on rehearing, the Texas Supreme Court improperly used a negligence standard to determine lack of probable cause (A110).

In its analysis, the Texas Supreme Court relied in part on an opinion of this Honorable Court, Wheeler v. Nesbitt, 29 How. 544 (1860), which requires a different application than that applied by the state court below.

Finally, the Texas Supreme Court rendered an unexpected interpretation and application of state law, effectively reversing prior law of malicious prosecution in the State of Texas.

b. The Nature And Circumstances Of The Alleged Malicious Prosecution.

Outlined below are the material facts leading to the guardianship and temporary hospitalization proceedings

commenced on Respondent's behalf, in support of Petitioners' assertions that their first amendment rights have been abridged. References made below are to the record unless preceded by an A, which is a reference to the Appendix.

Respondent Dahl was born in 1894 (379). He married Lille E. Dahl in 1921 (380). In 1932, they hired Clara Thomas to be their housekeeper (1493). She was a good and trusted employee who became part of the family over the years (455-456).

Petitioner Gloria Dahl Akin was born in 1934 (382). She would be the only child of Respondent and Lille E. Dahl (382).

Respondent and his wife sent their daughter to well-known private schools in Dallas (388). He would bring her beautiful gifts from his trips abroad (968, 973). He cared about who she dated, once opposing a boyfriend who was of another religion (744). He always

loved and cared about her very much (435, 449).

In 1951, Dr. Haynes Harville became Respondent's personal physician (1638).

Respondent assisted Petitioners, who married in 1954, even employing his son-in-law for six to nine months to help him get started (384, 1089) and contributing to his political campaigns (390, 1099). In the late 1950's Respondent gave Petitioners many furnishings for their house (e.g. 970-1100). In the early 1960's, Respondent and Petitioners were very close (1092). Lille Dahl died in the late 1950's.

Respondent and Petitioners maintained their close relationship in the 1960's and early 1970's (1092). They took trips together (1077, 1977). His daughter called or went by his office nearly every day (508, 633, 1443, 1463, 1442). He continued to give her gifts, even against her protests (1483). Petitioners named their only son for Respondent (725). Respondent would

spend every Sunday with Petitioners (432).

In 1966, Respondent suffered a stroke (1700).

From the early 1970's until 1978 when the guardianship and temporary hospitalization proceedings were filed, Respondent had a history of medical and behavioral problems associated with severe arteriosclerosis. The records of Dr. Harville, Respondent's doctor for twenty years, revealed that Dr. Harville received calls in 1971 and 1972 from Respondent's secretary and from his son-in-law. They reported that Respondent was becoming cantankerous; that his memory was faltering to the extent that he would forget what he had said or done from one moment to the next; that he had upbraided people and had run off customers; that he would throw temper tantrums and became accusatory of his staff; that he became very hard to please, which was unlike him; that he was living in the

past; and that key people in Respondent's firm were leaving after twenty years' tenure (1685, 1589, 1591).

In 1972 and '73, Dr. Harville recorded that Respondent had quit taking medication prescribed a year earlier (1691), that Respondent had great difficulty with balance and with progressive weakness and clumsiness in his left arm and leg (1693-1694). Respondent's daughter had informed Dr. Harville that Respondent dragged his leg (1693-1694). Dr. Harville attributed Respondent's problems to continued hardening of the arteries, disturbing Respondent's brain circulation in the portion controlling his left side (1697-1700).

In January 1973, Dr. Harville diagnosed Respondent's arteriosclerosis as critical, having progressed far enough to produce another stroke (1701).

In 1974, Dr. Harville prescribed medication that Respondent understood he

should take if he wanted "to continue to live." (506). He was to take it indefinitely (1719). The medication was a vessel dialator designed to increase circulation in Respondent's brain (1709-1712, 1719).

His daughter was concerned for her father's health (633, 735, 741, 744, 746, 508, 509, 1463). She wanted to take care of him (743, 746). She always made sure he was taking his medicine (506-509), although she did not know medically what the medicine performed (833). She helped all she could (1463). Clara Thomas, Respondent's housekeeper since 1932, saw that Respondent took his medication four times a day (1496). She would give him a walking cane to use (1497).

Respondent last saw Dr. Harville, his doctor for 25 years, in 1976 (1737). Respondent's daughter and Dr. Harville's office repeatedly tried to get Respondent to return to the office in the

months and years after that, but had no success (508).

Respondent's condition progressively worsened in 1977 and 1978. His usual smart attire declined (835, 1497). He became repetitious (783). He adamantly refused to employ a driver, although he had had several minor accidents (784). He began smoking again although he had quit years earlier (784). He would burn holes in his suits, causing his daughter to fear that he would set fire to his apartment.

In 1977 he sold holdings that he had always told his daughter and son-in-law to retain (758).

Sometime in 1977 or 1978, Respondent stopped taking the medication Dr. Harville had prescribed for him to take indefinitely (410, 506). He began to withdraw from the family (731). For fifteen years his daughter had phoned him almost daily and the calls had always pleased him (509), but he began

to tell her they were harassing to him (508, 509, 950, 951). Always before his family would help him walk because Respondent dragged his leg and they did not want him to fall (756). At this time, however, he was shunning their help (756). He refused a cane (756). When his daughter would kiss him hello or goodbye, he would pull away (756). He would become upset over matters that normally would not upset him (852).

In the first or second week of March 1978, Respondent told his daughter that he would marry on April 1, 1978 (393, 839). The woman was near the age of Respondent's daughter and his daughter questioned the woman's motives, in light of Respondent's wealth, age and poor physical condition (743). His daughter also felt that it was uncharacteristic of her father to be attracted to a woman with a background such as that of his fiance (756). His daughter had disapproved of the relationship

although they had no real fights about it (760, 852). Sometime in March, Respondent entered a hospital to have surgery (412, 497), but did not tell his daughter. It caused her to worry when she could not reach him by phone at his office (802, 497).

Respondent had told his daughter that he was going to fire Clara Thomas after he married (729, 833). He told his son-in-law, however, that he was not going to fire Clara, that what Clara did was "Clara's affair" (729, 730). In the end, Clara Thomas left her job of forty-six years, stating that she had loved Lille E. Dahl and did not want to work for a new Mrs. Dahl (496). Before she left, Clara mentioned to Respondent that some of Lille E. Dahl's china and silver should be given to Respondent's grandchildren (457). He agreed with her (458). Later, Respondent accused Clara of stealing the china and silver (1504, 420, 458). When she left his employ,

Respondent demanded back the automobile he had given Clara 10 years earlier (461, 1504).

Respondent's daughter asked her husband to talk to a lawyer about dealing with her father's behavior (726). She wanted him to be examined, since he still refused to see Dr. Harville (739, 742). On March 17, 1978, Respondent's son-in-law contacted a probate lawyer experienced in guardianship proceedings (711). Petitioners conversed with him frequently (712).

On March 27, 1978, Respondent's daughter met with Dr. Harville, concerning possible guardianship proceedings (1740). Respondent's daughter had been in frequent contact with Dr. Harville over a period of ten years concerning her father's health (1738). She told Dr. Harville about Respondent's short temper, irritability, poor driving habits, impending marriage to a younger woman, uncharacteristic business

decisions, treatment and attitude toward Clara Thomas and his pulling back from his daughter's affection and assistance (756, 1739, 1742). Dr. Harville agreed to assist in guardianship proceedings (1740).

The next day, pursuant to Tex. Prob. Code Ann. § 111 (Vernon 1980), (A B-3) attorneys for Respondent's daughter filed and obtained a hearing upon an application for temporary guardianship, including a request for authority to admit Respondent to a hospital for examination (811-816, 1166). Respondent testified under oath that she was extremely concerned for her father's well-being, that his manner had changed in the preceding months from what she had been used to previously, that his dress was inappropriate, that his language was foul, that he was not making sense at all times, that she did not understand his reasons for firing his housekeeper, that his driving habits

were bad, that he was not taking his medication and that he refused to accept help from those closest to him (1171). Judge Jackson, who presided over the guardianship proceeding, requested testimony from Dr. Harville prior to entering an order of temporary guardianship and he took the testimony of Respondent's daughter under advisement (1174).

There was a lapse of time before Respondent's daughter completed the statutory requirements for guardianship (951). There was no room at Presbyterian Hospital, where she wanted him to be examined (823). She vacillated on whether to go forward (951). She did not want to face the fact that she had to do something, but yet her father was moving further and further away from the family; he was not the same person she had known (951).

On April 2, 1978, in order to explain why she had not attended,

Respondent called Dr. Elliot, who her father said would perform Respondent's marriage ceremony on April 1, 1978, at 2:00 P.M. She learned for the first time that her father's marriage did not take place the day before (838).

Sometime between March 28, 1978, and April 20, 1978, Dr. Harville gave his sworn testimony to Judge Jackson concerning the guardianship application (1175). Dr. Harville openly testified that he had not seen Respondent recently (1177). The doctor, however, knew Respondent well, had treated him on numerous occasions, and considered him a friend as well as a patient (1176). He gave a short medical summary of Respondent's condition, then testified that in his opinion Respondent needed a guardian to protect his interests (1177). Judge Jackson recalled that Respondent's daughter had had a tremendous concern that people had taken or would take financial advantage of her father

(1181). The judge also felt that Dr. Harville had a true interest in Respondent (1177), that Dr. Harville's testimony was not based entirely upon the information provided by Respondent's daughter (1177).

On April 20, 1978, Judge Jackson entered an order of temporary guardianship, contingent upon the filing of oath and bond. Respondent's daughter still hesitated in completing the statutory procedures, filing her oath the next day but not her bond (1245).

On April 24, 1978, Respondent's son-in-law informally inquired of Probate Judge Joseph Ashmore about the procedural matters regarding temporary hospitalization (1207). Akin told Judge Ashmore about his wife's concern for Respondent, especially that Respondent was not taking his medicine (1207-1208). At the end of the conversation, he told Judge Ashmore that the family would

discuss the matter and decide what to do (1208).

On April 24, 1978, Respondent invited his daughter, his oldest granddaughter and his son-in-law to his apartment (952). He had prepared a bitter, handwritten memorandum that he read aloud to them, beginning with the words "I speak to you for the last time" (401). After that, Respondent's granddaughter was in tears (953). His daughter could not believe what he was saying but she knew something was definitely wrong (952). The event caused her to call the probate lawyer that evening to tell him to go forward immediately with the court proceedings so that Respondent could be examined (953).

On April 25, 1978, Respondent's daughter and son-in-law went to the courthouse to seek Respondent's temporary emergency hospitalization, completing forms for approval by Judge Ashmore,

who presided over proceedings relating to mental illness (1209) (A). The application for hospitalization is accompanied by a form affidavit prepared by the Mental Illness Department (1759). If a doctor later signs a certificate of mental illness after examination, the patient will be held subject to a fourteen day order of protective custody until the patient can be examined by an additional physician (1759). The proceedings are based on affidavit and no formal hearings take place as a rule (1226).

Before Judge Ashmore ordered Respondent's hospitalization, Respondent's daughter answered the judge's questions concerning the kind of danger Respondent's condition posed to Respondent and to others (1211). She also told Judge Ashmore that she was trying to arrange hospitalization for Respondent at Presbyterian Hospital, a common practice in mental illness proceedings

where families have the wherewithal to pay for the treatment there (1212). After the application was filed, Judge Ashmore phoned a doctor at Presbyterian Hospital to confirm that Respondent's condition was life-threatening if he did not receive his medication (1221).

On April 25, 1978, Judge Ashmore signed the warrant for Respondent's arrest and delivery to the emergency room at Presbyterian Hospital, and on April 26, 1978, at 9:30 a.m., the warrant was executed and Respondent was taken to Presbyterian Hospital (Plaintiffs' Exhibit 22).

On April 26, 1978, at 11:22 a.m., Respondent's daughter posted her bond to become Respondent's temporary guardian (Plaintiffs' Exhibit 37).

On April 26, 1978, Dr. Thomas A. Woods examined Respondent (1626), spending about one-half hour with Respondent on April 26. Dr. Woods was "satisfied at that time that his case

sounded serious...and that, in fact, he did need further investigation of this." (1634). Dr. Wood completed Form 633, stating under oath his diagnosis: that Respondent suffered from "organic brain syndrome with psychosis" (Defendant's Exhibit 12). He further stated under oath:

> I am of the opinion that patient is mentally ill and I am further of the opinion that patient requires observation and treatment in a mental hospital. That I am of the opinion that patient does require hospitalization in a mental hospital. That I am of the opinion that patient is likely because of his mental illness to cause injury to himself or others if not immediately restrained." (Defendant's Exhibit 12).

He testified at trial that all of the symptoms that had been recorded by Dr. Harville, by Respondent's employees, and by his family were consistent with his diagnosis made on the day that Respondent was hospitalized (1647).

Also on April 26, 1978, Dr. Haynes Harville performed a physical examination (1744). Dr. Harville purposely avoided making a mental evaluation, leaving it to the other psychiatric and neurological consultants who he believed would be better able and better trained to evaluate Respondent's mental competency in a legal way. Dr. Woods had access to Dr. Harville medical records concerning Respondent's history of arteriosclerosis (1631). In addition, Respondent received certain medical tests including an electroencephologram and a CAT scan (computerized axial tomography) (1631-1632). The CAT scan revealed that Respondent had suffered "an atrophy in the brain, that is, a shrinking in the overall size of the tissue" (1632). His symptoms were thus diagnosed as being caused by the organic changes

in his brain, "organic" referring to the fact "that the illness is produced by the change in the organ itself, rather than strictly a mental illness produced within a healthy tissue" (1632).

On April 27, 1978, pursuant to the statutes of the State of Texas, an order of protective custody was issued by the Probate Court (1763, Plaintiff's Exhibit 29). Judge Ashmore testified in the trial below that regardless of the warrant, if the examining physician does not feel that the patient is mentally ill, then the patient is released without further order of the court and an order of protective custody would not issue (1763-1766).

On May 8, 1978, Respondent was examined by a second doctor, James P. Grigson, M.D., who on that date stated on Form 633, under oath to the Probate

Court, that Respondent suffered from "chronic organic brain syndrome with impairment in reasoning and judgment" (Defendant's Exhibit 11), and that the condition was secondary to arteriosclerosis (1539). Dr. Grigson had examined Respondent on April 26 and April 29, as well as on May 8 when he completed the affidavit. Dr. Grigson's certificate laid the predicate for Respondent's 90-day commitment (1772). On May 5 and May 9, 1978 Respondent was examined by Dr. Byron Howard in the psychiatric unit of Presbyterian Hospital (1790). He reviewed the records, talked to the family, talked to the nurses and the aides in the psychiatric unit and visited with Respondent. He diagnosed that Respondent suffered from "organic brain syndrome, moderate, secondary to cerebral arteriosclerosis" (1792). He arrived at this diagnosis by taking a mental status examination as part of his conversation and contact with

Respondent, took a detailed history from Respondent and from the family (1793).

On May 17, 1978, Judge Joseph E. Ashmore signed and entered an Order of Dismissal (Plaintiffs' Exhibit 28), based on Dr. Woods' testimony that Respondent no longer represented a danger to himself (1780).

Judge Ashmore however had released Respondent to his attorney and to the protective custody of his employees a week or four or five days before he dismissed the case (1230). Pertaining to Respondent's early release, Judge Ashmore testified that the early release was based on assurances by Respondent's employees and his attorney that they would guard against Respondent driving a car, there being a possible danger to the public as well as to Respondent (1228-1229).

During the time Respondent was hospitalized he was permitted to go to

Rotary meetings and receive visitors, including his attorneys (504, 508).

REASONS FOR GRANTING THE WRIT

The decision of the Texas Supreme Court in this case gives a scope and application to the common law doctrine of malicious prosecution so broad that it violates Petitioners' first amendment rights of petition and free expression, and chills the exercise of these rights in future litigants.

If the judgment stands, its impact will be grave -- not only in its general impact of inhibiting the exercise of the right of petition to seek redress of grievances and to report possible criminal activities, but especially in its specific focus of penalizing the exercise of first amendment rights in statutorily governed mental health proceedings which were enacted to protect and care for those citizens who are unable to do so themselves. These issues are momentous and urgently call

for the consideration and determination of this Court.

The right of access to the courts and the right of free expression are involved in any malicious prosecution action because of an inherent conceptual conflict. The right of access to the courts, and to free speech, are constitutional guarantees, yet the doctrine of malicious prosecution is a punishment for the abuse of those rights. This conflict is heightened in Petitioners' case, where they commenced guardianship and temporary hospitalization proceedings pursuant to enactment of the Texas State Legislature, in which the state, in an important exercise of its power of parens patriae, not only protects the mentally ill from themselves, but also the general public from those so afflicted.

The strongest protection against a penalty or chill on citizens who would instigate criminal or mental health

proceedings, or who would file a civil action, is the element of probable cause. All of Petitioners' claims fundamentally arise from the state courts' erroneous treatment of this essential element of malicious prosecution.

The errors relating to probable cause fall into two categories. First, some errors individually punished and chilled protected speech and free access. A second group of errors were not constitutionally significant taken alone but repugnant to the first amendment when combined with others.

In the first category, it was found in the trial courts that Petitioners lacked probable court to believe that Respondent was incompetent or mentally ill. The finding was upheld on appeal upon a mere implication that Petitioners failed to make full and honest disclosure to the probate courts responsible for such proceedings. No specific

finding that Petitioners' speech was knowingly false was made, which rendered the final determination of lack of probable cause constitutionally infirm in and of itself.

Additionally, The Texas Supreme Court held that liability may attach to Petitioners on the basis of evidence they knew or should have known at the time the guardianship and temporary hospitalization proceedings were commenced. The "should have known" standard is unknown in the common law of malicious prosecution and far too elusive for a cause of action intertwining with fundamental rights and laced with stringent requirements at common law. Just as the reasonable person standard has been rejected in other first amendment contexts, the 'should have known' standard must be rejected here.

The second category of errors exacerberated or perhaps led to the

first category of errors. Certainly the errors are all interrelated, making it a compelling case for this Court's independent examination of the record, due to the first amendment principles at stake. The second category includes the fact that probable cause was treated as a pure question of fact, and not as a pure question of law or as a mixed question of fact and law. In addition, the burden of proof was shifted to Petitioners, who were defendants below, forcing Petitioners to prove probable cause, instead of making Respondent prove the lack thereof. Moreover, evidence of Respondent's competency was permitted to constitute evidence of lack of probable cause. And finally, an inference of bad motives was permitted to constitute some evidence of a lack of probable cause, where such evidence of motives should have been permitted only to show malice, and not to show a lack of probable cause.

That such errors supported an award of draconian damages is constitutionally impermissible, and such a result mandates consideration of this case.

A. The inherent conflict. The opinion below strikes at the core of a tension that has existed through the course of this country's jurisprudence. The law of malicious prosecution protects individuals from groundless criminal charges and from vexatious and frivolous civil actions. By its very nature, such common law doctrine conflicts with the exercise of the first amendment rights of petition and free expression as embodied in the fourteenth amendment.

It is precisely this conflict which has long caused malicious prosecution actions to be unfavored by the law as against public policy. See Stewart v. Sonneborn, 98 U.S. 187, 198 (1879); Reed v. Lindley, 240 S.W. 348, 351 (Tex. Civ. App.-Fort Worth 1911, no writ). Damages in malicious prosecution cases have

never been assessed with the readiness of suits for being hit by a defective train. Texas courts have held:

> The reason for the rule not favoring actions for malicious prosecution...is that a litigant should be entitled to have his rights determined without the risk of being sued and having to respond in damages for seeking to enforce his rights, as free access to the courts is provided for the administration of the law of the land.

Lancaster &. Love, Inc. v. Mueller Co., 310 S.W.2d 659, 653 (Tex. Civ. App.-Dallas 1958, writ ref'd.).

It is well established that the right of access to the courts is an aspect of and is protected by the first amendment right to petition the Government for the redress of grievances, and the right to freedom of speech. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510-511 (1972). California Motor Transport was an antitrust case dealing with the Noerr-Pennington doctrine, which had its

genesis in the cases of Eastern Railroad Conference v. Noerr Motor Freight, 365 U.S. 127 (1961) and United Mine Workers v. Pennington, 381 U.S. 657 (1965). These cases dealt with the question of whether the exercise of the first amendment right of petition could constitute a violation of the Sherman and Clayton Acts. In utilizing the Noerr-Pennington doctrine to hold that the antitrust laws do not prohibit the filing of a lawsuit, this Court held that one cannot lightly impute an intent to invade these first amendment freedoms. 404 U.S. 510. Indeed, an aggrieved party should not lightly be deprived of the constitutional right to petition the courts for relief. The instant case so chills that right so as to virtually constitute such a deprivation. Id.

The extent of first amendment protection for access to the courts is not invariant to the nature of the lawsuit. Grip-Pak, Inc. v. Illinois

Tool Works, Inc., 694 F. 2d 466, 471 (7th Cir. 1982). In NAACP v. Button, 371 U.S. 415 (1963), the National Association for the Advancement of Colored People exercised its right of petition to use constitutional litigation to break down official segregation. Id. at 429-430. Indeed, such exercise of the right of access to the courts in an attempt to protect one's civil rights should entitle that litigant to more protection than, for example, a competitor to use the right of access for anticompetitive reasons, as is protected by the Noerr-Pennington doctrine. Grip-Pak, Inc. v. Illinois Tool Works, Inc., supra. The instant case furnishes this court with a situation as compelling, if not more compelling, than the Button case. At issue is the exercise of the right to petition the state to assume its duty to care for those who are unable to care for themselves, and who might injure themselves or others

due to mental illness. This is a compelling state interest mandating greater first amendment protection against malicious prosecution actions for the institution of such proceedings, particularly because the speech attacked in the malicious prosecution action is specifically provided for by the state legislature.

B. Reliance On Texas Mental Health Statutes Is Entitled To First Amendment Protection.

In 1978 and today, by Texas Statute, "any adult person" may commence temporary hospitalization proceedings by filing a sworn statement "upon information and belief" stating among other prerequisites, that a proposed patient is mentally ill. TEX. REV. CIV. STAT. ANN. art. 5547-31 (Vernon Supp. 1983). In addition, "a credible person" may represent in writing that another person is mentally ill and likely to cause injury to himself or others if not

immediately restrained. Upon obtaining a warrant, a peace officer or a health officer may take the proposed patient to a hospital facility. TEX. REV. CIV. STAT. ANN. art. 5547-27(a) (Vernon Supp. 1983). "Such person admitted upon such warrant may be detained in custody for a period not to exceed 24 hours, unless a further written order is obtained from the County Court or Probate Court of such county, ordering further detention." Id.

Respondent's daughter relied on Article 5547-27 and Article 5547-31 when she sought the Respondent's hospitalization. While the temporary hospitalization statute permits citizens to file affidavits based on "information and belief" Respondent's daughter has been held liable for those very statements.

It is as much the policy of the law to care for its weaker citizens as it is the policy to encourage criminals to be brought to justice and to encourage

settlement of civil disputes through civilized procedures. Citizens of the state have a legitimate interest under the power of parens patriae to provide care for those citizens who are unable because of emotional disorders to care for themselves; "the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill." Addington v. Texas, 441 U.S. 418, 426 (1979) (holding that Texas procedures for indefinite commitment require proof by clear and convincing evidence). Parens patriae is a power inherent in the supreme power of every state and often necessary to be exercised in the interest of humanity. See generally Note, Civil Commitment of the Mentally Ill, 87 Harv. L. R. 1190, 1207 (1974).

That a compelling state interest supports to exercise on the first amendment rights exercised in this case renders the chilling of first amendment

rights more grave, and compels reversal of the state courts' ruling.

C. Protecting The Right Of Petition With Probable Cause.

The element of probable cause is the single protection to both to a citizen's right of access to the courts, and his right to protected speech in proceedings before those courts. The separation of legitimate from illegitimate speech calls for sensitive tools. Speiser v. Randall, 357 U.S. 513, 525 (1958). Properly applied, the common law rules of probable cause constitute one of the oldest, most "sensitive tools" developed to protect pure speech in making statements to authorities, and to protect right of access to the courts in civil matters. There were no sensitive tools applied below, however, when the Texas courts misperceived the importance on the rules of probable cause.

In a malicious prosecution action, the element of want of probable cause is an independent factor which must be proved by the Plaintiff separate and apart from any other element. Biering v. First National Bank, 69 Tex. 599, 7 S.W. 90, 92 (1888); Griffin v. Chubb, 7 Tex. 603, 612 (1852). The mere fact that there is probable cause is a complete defense, regardless of any other evidence or circumstances. Id. See also Lloyd v. Almeda State Bank, 346 S.W.2d 947, 952 (Tex. Civ. App.-Waco 1961, writ ref'd n.r.e.). Further, the want of probable cause can never be inferred from proofs of any malice, even the most express malice, because probable cause is independent of malicious motive. Biering v. First National Bank, supra; Griffin v. Chubb, supra at 615; RESTATEMENT (SECOND) OF TORTS 2d § 669A (1971).

However, the state courts in this case apparently ignored this well established tenet of law.

The Texas Supreme Court held that it is proper to consider the motives of a litigant in determining the question of probable cause. 27 Tex. Sup. Ct. J. 23, 25 ("jury properly considered all of the evidence surrounding the motivation, beliefs, and faith of the prosecutor on this action"). Therefore, the state courts have made a grave error in applying evidence of motives to the want of probable cause, instead of properly considering them as evidence of malice.

Analogous to the instant case is the situation which confronted this Court in Bill Johnson's Restaurants, Inc. v. National Labor Relations Board, 51 U.S.L.W. 4636 (U.S. May 31, 1983). In holding that prosecuting an unmeritorious lawsuit for a retaliatory purpose was not an unfair labor practice, this Court construed the antitrust laws as

not prohibiting the filing of a lawsuit, regardless of the plaintiff's anticompetitive intent on purpose in doing so. Id. at 4639. In the instant case, not only did the state court erroneously infer lack of probable cause from evidence relating to malice, but compounded the error by inferring malice from want of probable cause.

The Texas Supreme Court further held that "the burden of proof shifts to the defendant to offer independent proof of probable cause." 27 Tex. S. Ct. J. 23, 24. However, the common law rule is that the onus probandi is on the plaintiff "to prove affirmatively...that the defendant had no reasonable ground for commencing the prosecution." Wheeler v. Nesbitt, 29 How. 544, 541 (1860). See also Bekkeland v. Lyons 96 Tex. 255, 72 S.W. 56, 57-58 (1903).

In addition, the Texas Supreme Court and the Court of Appeals treated probable cause, or the lack of it, as a

mere question of fact, 27 Tex. S. Ct. J. at 24, opposite to the common law. "What facts and circumstances amount to probable cause is a pure question of law. Whether they exist or not in any particular case, is a pure question of fact. The former is exclusively for the court, the latter for the jury." Landa v. Obert, 45 Tex. 539, 543 (1876). See also Stewart v. Sonneborn, 98 U.S. 187, 198 (1879).

When the state courts reviewed probable cause in this case, it was treated as any other fact question. Therefore, both appellate courts reviewed the evidence by a test that considers only evidence tending to support the jury finding of lack of probable cause. See 645 S.W.2d at 513, n.4. As a result, all of the uncontroverted testimony was disregarded concerning Respondent's behavior, physical condition, medical history and his diagnosis by four attending physicians. In the

Texas Supreme Court, the sworn testimony and affidavits of physicians who diagnosed Respondent as being mentally ill was disregarded for all purposes, and was not even considered for showing the reasonableness of Petitioners' beliefs. See 27 Tex. S. Ct. J. at 24.

Finally, the Texas Supreme Court held that a jury may determine lack of probable cause by considering "all evidence which the prosecutor of the action knew or should have known relative to the condition of the plaintiff and upon which evidence the prosecutor based or should have based his action." Id. at 25. This clearly is erroneous. See Griffin v. Chubb, supra at 615. At common law, probable cause is determined by the existence of such facts and circumstances that would excite belief in a reasonable mind, acting on facts known to the initiator. Wheeler v. Nesbitt, supra. Therefore, reasonableness in the instant case turns on facts

known by Petitioners. Indeed, the only thing it appears the Petitioners "should have known" was that a jury would find Respondent competent.

In other first amendment contexts, this Court has held that "[f]ear of guessing wrong must inevitably cause self-censorship and thus create the danger that the legitimate utterance will be deterred." Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 50 (1971). Where free access, free speech and reliance on state statutes are involved, a "should have known" standard is no less a deterrent to legitimate utterances. Imposing liability for acting on vague facts and circumstances Respondent's daughter did not know but should have known is "simply inconsistent" with free access and the protected speech involved with relying on statutory procedures. See Id. Petitioners should not be held liable for lawful reliance on statutes.

Where a finding of lack of probable cause purports to rest on a defendant's material falsehoods, misrepresentations, or concealment of material facts, there must be evidence and findings specifying the false statements, and indicating that they were material to the prior proceeding and that they were knowingly false or in reckless disregard for the truth. See Pickering Board of Education, 391 U.S. 563 (1968); New York Times Co. v. Sullivan, 376 U.S. 254, 278 (1964).

At common law, "[i]n order to charge a private person with responsibility for the initiation of proceedings by a public official, it must therefore appear...that the information furnished by him was known to be false." RESTATEMENT 2d TORTS § 653 comment (g) (1977) (emphasis added).

However, in the instant case, there was no finding of actual falsity or reckless disregard for the truth in

support of the finding that Petitioners maliciously prosecuted Respondent. Nevertheless, the state courts awarded damages based on malicious prosecution with even less proof than is required in libel cases. In Cate v. Oldham, 707 F.2d 1176 (11th Cir. 1983), the Eleventh Circuit held that the first amendment requires that the burden of proof for malicious prosecution actions should be the same as that required in libel actions. Id. at 1184. In doing so, the Cate court drew an analogy to the decision of New York Times Co. v. Sullivan, supra by using the same distinctions regarding the burden of proof and malicious prosecution actions as this court drew regarding libel actions in the New York Times case. Therefore, malicious prosecution, like libel, obscenity, contempt, advocacy of violence, disorderly conduct or any other possibly defensible basis for suppressing speech or petition, must be

defined and judged by standards which are not repugnant to the Constitution. The state courts' rulings constitute an impermissible penalty for exercise of first amendment rights by Petitioners and future litigants.

D. The Award Of Punitive Damages In The Amount Of $1,190,000.00 Constitutes A Subsequent Punishment For The Exercise Of First Amendment Rights.

The imposition of draconian damages by a state court for the legitimate exercise of first amendment rights must not be tolerated by this court, and constitutes, in itself, a compelling reason for review. Subsequent punishments can present a substantial infringement of first amendment rights. Cate v. Oldham, supra at 1186. In New York Times v. Sullivan, supra, this Court, in reviewing an award of $500,000.00 in "presumed" damages, recognized that "[t]he fear of damage awards under a

rule such as that invoked by the [state] courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute". Id. at 277. As Mr. Justice Brandeis said, concurring in Whitney v. California, 274 U.S. 357 (1927), a "police measure may be unconstitutional merely because the remedy, although effective as a means of protection, is unduly harsh or oppressive". Id. Indeed, the power to regulate must be exercised so as not, in attaining a permissible end, unduly to infringe on a protected freedom. Cantwell v. Connecticut, 310 U.S. 296, 304, 308 (1940). Any judgment of this magnitude, imposed routinely on the facts contained in the instant case and sustained no less routinely on appeal will necessarily have a repressive influence which will penalize and chill the exercise of first amendment rights. In the instant case the common law doctrine of malicious

prosecution must confront, and be subordinated to, the Constitution.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

OF COUNSEL

R. Reynolds Messall
Richardson, Texas

PRO SE,

GLORIA D. AKIN

and

TED M. AKIN

CERTIFICATE OF SERVICE

I do certify that a true and correct copy of the foregoing has been sent to Bickle & Case, attorneys for Respondent, 4300 Thanksgiving Tower, Dallas, Texas 75201, by depositing in the United States Post Office mailbox with first class postage.

83 - 1375

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

GLORIA D. AKIN AND
TED M. AKIN, PETITIONERS

V.

GEORGE L. DAHL, RESPONDENT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Petitioners, pro se,

Gloria D. Akin and
Ted M. Akin
5323 Dentwood
Dallas, Texas 75220
(214) 368-4246
(214) 749-6464

Of Counsel,

R. Reynolds Messall
Richardson, Texas

APPENDIX

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CAUSE NO. C-1869

[IN THE SUPREME COURT OF TEXAS]

GLORIA DAHL AKIN	§	
and TED M. AKIN	§	
	§	FROM DALLAS CO.,
vs.	§	SEVENTH DISTRICT
	§	
GEORGE L. DAHL	§	

Petitioners' motion for rehearing filed herein on October 18, 1983, in the above-numbered and entitled cause having been duly considered, it is ordered that said motion for rehearing as supplemented be, and hereby is, overruled. [November 23, 1983.]

(Justice Robertson not sitting.)

* * * * *

IN THE TEXAS SUPREME COURT

GLORIA D. AKIN ET VIR, vs.

GEORGE L. DAHL

No. C-1869

From Dallas County, Seventh District.

Writ of error granted March 23, 1983. (26 Tex. Sup. Ct. Jour. 288) (Opinion of CA, 645 S.W.2d 506).

Judgment of the court of appeals is affirmed. (Opinion by Justice Wallace. Concurring opinion by Justice Kilgarlin joined by Justice Spears. Justice Robertson not sitting.)

For Petitioners: McDaniel and Travis, Samuel D. McDaniel, Austin, Texas, Kronzer, Abraham, Watkins, Nichols, Ballard and Friend, James Kronzer, Houston, Texas.

For Respondent: Bickel and Case, Tom Case, Dallas, Texas.

* * * * *

This is a malicious prosecution suit. The court of appeals affirmed the judgment of the trial court, awarding damages to the Respondent herein. 645 S.W.2d 506. We affirm the judgment of the court of appeals.

George Dahl is the father of Gloria Dahl Akin and the father-in-law of her husband, Ted Akin. The Akins and their children are also beneficiaries of a trust established by Mr. Dahl's late wife, Lille E. Dahl, and of which George Dahl is Trustee and a beneficiary. By April of 1978, differences had arisen between the Akins and Mr. Dahl

culminating in a letter written by Mr. Dahl to the Akins wherein he announced the termination of all relations between himself and the Akins. When Mr. Dahl wrote this letter in April of 1978, he was unaware that a month earlier, March 28, 1978, Gloria Akin had filed an application for temporary guardianship of her father. Specifically the application stated that:

> George Leighton Dahl is not mentally competent to attend his person or to his business affairs; that because of his personal condition and the nature and extent of his business interests it is necessary that a temporary guardian be appointed; ...

The order was granted on April 20, 1978. On April 25, Mrs. Akin filed a separate application to have Mr. Dahl committed to a hospital for treatment. The order of commitment was signed by a probate judge and on April 26, Mr. Dahl was arrested and committed to Presbyterian Hospital in Dallas. Three weeks later, May 16, this mental illness proceeding

was dismissed and no appeal was taken therefrom. On May 22, Mrs. Akin amended her March 28 temporary guardianship application, seeking permanent guardianship. A competency trial was subsequently held with findings favorable to Mr. Dahl, and on May 30, 1978, the Temporary Guardianship Order was revoked. As a consequence of these events, Mr. Dahl filed suit against the Akins, alleging among other things, malicious prosecution. At a trial before a jury, the Akins were found guilty of malicious prosecution and after remittitur, a judgment for Mr. Dahl was affirmed by the court of appeals.

Two issues are considered herein; one concerning a lack of probable cause for initiating the prosecutions and the other touching vicarious liability of a joint tort-feasor.

In order to make out a prima facie case of malicious prosecution, the plaintiff must show, among other things, that

there was a lack of probable cause for the proceedings brought against him by the defendant. James v. Brown, 637 S.W.2d 914, 918 (Tex. 1982). It is the contention of the petitioners that once some evidence of probable cause is presented by the defendant, only rebutting evidence as to those specific facts may be shown, and if those specific facts supporting probable cause are not rebutted the question is no longer one for the trier of fact but a judgment notwithstanding the verdict or instructed verdict was proper because probable cause was established by the Akins as a matter of law and no issue was left for a jury determination.

Initially, it is necessary to separate the various types of evidence presented for review. The Akins rest their point of error on testimony and affidavits which they feel was evidence of probable cause to seek guardianship and hospitalization of Mr. Dahl. On the

other hand, Mr. Dahl presented independent evidence that he did not require a guardian nor hospitalization, plus evidence rebutting that evidence of the Akins which they allege demonstrated the probable cause to take the action they did. Mr. Dahl was found sane and competent at a jury trial in May of 1978. This eventual adjudication of the mental state of Mr. Dahl is an event subsequent to his confinement and guardianship proceedings and has no bearing on the beliefs and motivations of the Akins when they took the actions they did against Mr. Dahl. This is, however, a two-edged sword. Just as his eventual adjudication as sane and his subsequent release was not evidence of a lack of probable cause, the initial determination of a lack of competency made shortly after his confinement was not evidence of probable cause. Events subsequent to the action of confinement and legal proceedings may tend to show whether the action

of the Akins turned out to be correct or incorrect, but is not material to the beliefs and motives at the time the proceedings were instituted. Green v. Meadows, 517 S.W.2d 799 (Tex. Civ. App.-Houston [1st Dist.] 1975) rev'd on other grounds, 524 S.W.2d 509 (Tex. 1975). It is the events prior to the institution of the proceedings which must be examined, and only those events, to determine if the defendants had probable cause to act.

In this regard, it is also not evidence of probable cause that the probate courts agreed to take the temporary guardianship and commitment action. Raleigh v. Heidenheimer Bros. v. Cook. 60 Tex. 438, 442 (1883). Holding otherwise would only invite chicanery and allow those misleading the lower courts to profit on appeal by their misdeeds. It is the party instigating the lawsuit in question who receives the scrutiny of the court as to the beliefs and

motivations and not the magistrate or tribunal which may have initially been convinced that the prosecution was proper.

The burden of proving that no probable cause existed for instituting the proceedings in a malicious prosecution case is initially upon the plaintiff, and there inferrably is an initial presumption that a defendant acted reasonably and in good faith and therefore had probable cause. See and compare, Sebastian v. Cheney, 86 Tex. 497, 25 S.W. 691, 693-694 (1894). However, this presumption in favor of the defendant disappears when the plaintiff produces evidence that the motives, grounds, beliefs and other evidence upon which the plaintiff acted were indeed not probable cause to commence the proceedings which the plaintiff instituted. The burden of proof then shifts to the defendant to offer independent proof of probable cause. Once these opposing parties have

entered into a factual contest on the issue of probable cause, a fact issue is created for resolution by the trier of fact. This is a cornerstone of our judicial system.

> "When the facts are in controversy the question of probable cause must necessarily go to the jury, and then the court must give such instruction as will enable them to draw the correct conclusion from the facts as they may find them and the law thus given." (Citations omitted.)

Landa v. Obert, 45 Tex. 539, 543 (1876). Not only may the trier of fact look to evidence relative to the motivation and beliefs of the party instigating the proceedings, but the trier of fact may also look to the good faith or lack thereof demonstrated by the prosecutor of the action. Lloyd v. Myers, 586 S.W.2d 222, 227 (Tex. Civ. App.-Waco, 1979, writ ref'd n.r.e.), Eans v. Grocers Supply Co., 580 S.W.2d 17, 21 (Tex. Civ. App.-Houston [1st Dist.] 1979, no writ). It is proper for the

trier of fact to consider all evidence which the prosecutor of the action knew or should have known relative to the condition of the plaintiff and upon which evidence the prosecutor based or should have based his action. We therefore hold that the jury properly considered all of the evidence surrounding the motivation, beliefs, and good faith of the prosecutor of this action.

Petitioners present a no-evidence point concerning the lack of probable cause finding. When considering a no-evidence point, we must examine the record to determine if there is at least some evidence of probative force to support the findings of the trier of fact. Ray v. Farmer's State Bank, 576 S.W.2d, 607, 609-10 (Tex. 1979). The evidence is set out in great detail in the court of appeals opinion and we will not repeat it here. However, we have examined the record and find there is evidence to support the jury's findings that the

prosecutor of the action in this case lacked probable cause.

Lastly, we will consider the standard by which the jury is instructed to make its determination as to the existence or non-existence of probable cause itself. Long ago, this Court stated in Ramsey v. Arrott, 64 Tex. 320 (1885) that,

> "Among the very best definitions given of probable cause, the absence or want of which is essential in actions for malicious prosecution, is that by the Supreme Court of the United States in Wheeler v. Nesbitt, 24 How. 545, and which is, 'the existence of such facts and circumstances as would excite belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted.'"

Id., at 323. Williams v. Frank Parra Chev. Inc., 552 S.W.2d 635, 638 (Tex. Civ. App.-Waco 1977, no writ). The standard set out is an objective one wherein the charge of the jury is one concerning a reasonable person test to find no

probable cause. This is essentially the charge set out by the trial court and is approved by this Court.

The second issue before this Court concerns the finding by the trier of fact of a conspiracy between the Akins and the award of exemplary damages flowing therefrom absent a specific finding of malice on the part of Ted Akin.

Petitioner's first point of error surrounding this issue is that the evidence is insufficient in law and fact to support the conspiracy finding. This Court is without jurisdiction to entertain a factual insufficiency point. Hall v. Villareal Development, Corp., 522 S.W.2d 195 (Tex. 1975). Regarding legal insufficiency, we have examined the record and found evidence to support the jury findings regarding conspiracy. The Akins next argue in essence that Ted Akin cannot be guilty of malicious prosecution absent a finding of malice against him, and as a consequence the

exemplary damages may not be awarded against him.

Malice is an element of malicious prosecution. James v. Brown, 637 S.W.2d at 918. The jury found that Gloria Akin acted with malice in prosecuting the guardianship and mental illness proceedings and that Ted Akin and Gloria Akin acted in a conspiracy in planning, instituting and maintaining the guardianship and mental illness actions. An unlawful act alone is not grounds for punitive or exemplary damages; more is required in the nature of an act which is wanton or malicious. Ware v. Paxton, 359 S.W.2d 897 (Tex. 1962). In the present case, there was no issue presented to the jury inquiring as to malice on the part of Ted Akin. However, once a civil conspiracy is found, each co-conspirator is responsible for the action of any of the co-conspirators which is in furtherance of the unlawful combination. Carroll v. Timmers Chev.,

Inc. 592 S.W.2d 922, 926 (Tex. 1979). Therefore, each element of the cause of action of malicious prosecution is imputed to each co-conspirator. If the object of the conspiracy is an unlawful tort, such as negligence, which did not contain wanton behavior, malice, or their progency as an element of the cause of action, then that additional finding would be necessary as to each co-conspirator against whom exemplary damages were sought. In the present case, however, malice is an essential element of the offense of malicious prosecution and a finding that Ted Akin conspired with Gloria Akin in conduct which amounts to malicious prosecution precludes the necessity of a specific finding of malice on the part of Ted Akin.

JAMES P. WALLACE
Justice

Concurring opinion by Justice Kilgarlin joined by Justice Spears. Justice Robertson not sitting.
Opinion delivered: October 5, 1983.

CONCURRING OPINION

The majority has correctly concluded that because of the conspiracy finding against Ted Akin it is not necessary that there be a finding of malice on his part for him to be subject to punitive damages.

I write only because the punitive damage issue submitted inquired how much money George Leighton Dahl should be awarded as exemplary damages. That special issue was erroneous, but as no objection was levelled against it, and no points of error preserved as to its submission, the Akins cannot now be heard to complain.

The punitive damages issue properly should have been divided into two parts, allowing the jury, if it desired, to assess differing amounts of exemplary damages against the Akins.

This matter has been the settled law of this state since this Court's holding in St. Louis and S.W. Ry. Co. of

Texas v. Thompson, 102 Tex. 89, 113 S.W. 144 (1908). That case involved allegations of conspiracy to falsely and maliciously accuse Thompson, the railroad's employee, of wrongdoing. This Court held that if any of the defendants were actuated by malice in making charges against Thompson, then the jury, in its discretion, could assess exemplary damages against any or all of the defendants. However, this Court went on to state that unlike actual damages, all defendants should not be subjected to the same verdict of exemplary damages, because they may have acted with varying degrees of malice, or with no malice at all.

Although there are a few exceptions, the Texas position represents the view taken in an overwhelming majority of jurisdictions in the United States. For cases involving allegations of conspiracy and/or malicious persecution where it was held that inquiry as to

exemplary damages should be made separately as to each defendant, see Fenslage v. Dawkins, 629 F.2d 1107 (5th Cir., 1980); Hotel Riviera, Inc. v. Short, 80 Nev. 505, 396 P.2d 855 (1964); Freeman v. Sproles, 204 Va. 353, 131 S.E.2d 410 (1963); Mahanna v. Westland Oil Co., 107 N.W.2d 353 (N.D. 1960); Edquest v. Tripp & Dragstedt Co., 93 Mont. 446, 19 P.2d 637 (1933); Thompson v. Catalina, 205 Cal. 402, 271 P. 198 (1928); and Nelson v. Halvorson, 117 Minn. 255, 135 N.W. 818 (1912).

Accordingly, I would submit that in cases such as this, a proper submission of punitive damages would be not how much the plaintiff should recover in total, but rather how much the plaintiff should recover as against each specific defendant.

WILLIAM W. KILGARLIN
Justice

Justice Spears joins in this concurring opinion.
Opinion delivered October 5, 1983.

* * * * *

George Leighton DAHL, Appellant,

v.

Gloria Dahl AKIN and Ted M. Akin, Appellees.

Gloria Dahl AKIN, et al., Appellants,

v.

George Leighton DAHL, Appellee.

Nos. 9339 to 9341

Court of Appeals of Texas, Amarillo.

Oct. 29, 1982.

Rehearing Denied Dec. 22, 1982.

REYNOLDS, Chief Justice.

The litigants have perfected three separate appeals from individual judgments rendered in three suits filed in different district courts of Dallas County and consolidated for trial before a jury. The appeals, involving a number of interrelated subject matters, were submitted together, and this opinion

sets forth the rationale upon which we have rendered a judgment in each cause.

Preliminary summaries of the background, factual setting, and litigation are appropriate to position the appeals. The details adscititious to the summaries and pertinent to each cause are included in the discussion of the appeal of that cause.

Background

Gloria Dahl Akin is the only child of George Leighton Dahl and his deceased wife, Lille E. Dahl. Mrs. Akin and her husband, Justice Ted M. Akin, are the parents of four children, two of whom were minors when these causes were tried.

By her will, Mrs. Dahl, who died in 1957, created a testamentary trust--the Lille E. Dahl Trust. Vesting the residue of her estate in Mr. Dahl, who was appointed trustee, and his successors, in trust, Mrs. Dahl specified that

> (b) If at any time during the life of my husband, GEORGE L. DAHL, his income from all other sources is insufficient to support and maintain him in the station of life to which he is accustomed, having in mind his income from all other sources, there shall be paid to my husband out of the net income and/or corpus of the Trust such amounts as are necessary to make up such deficiency, it being specifically understood, however, that my husband, GEORGE L. DAHL, shall in no manner participate in any decisions with reference to payments to himself out of the income and/or corpus of the Trust, but such decisions shall be made by my said daughter Gloria Lille Dahl Akin, if living ...

Subject to this provision, Mrs. Dahl then provided that

> the remaining net income of the Trust, in the discretion of the Trustee, may be paid to my daughter, GLORIA LILLE DAHL AKIN, and to any of my grandchildren in such amounts as the Trustee shall determine.

Any income not distributed to the beneficiaries is, by the terms of the trust, to be accumulated and become a part of the corpus of the trust.

Mrs. Dahl next granted two special powers of appointment with respect to

the trust properties. Mr. Dahl was empowered to appoint, by his deed or other written instrument during his life or by his last will and testament, the trust properties or part thereof to and among Mrs. Akin, her husband, and her children and descendants, and the spouses of her children and descendants, in such proportion and upon such terms and conditions and upon such trusts as he shall determine. Subject to that special power of appointment, Mrs. Akin was granted the power to appoint the trust properties, by her will at her death, to and among her husband, and her children and descendants, and the spouses of her children and descendants, upon such terms and conditions and subject to such trusts as she may see fit.

Subject to the two special powers of appointment, the trust was to continue until its termination at the death of Mr. Dahl and Mrs. Akin. By the trust's termination at that time, the assets

vest in Mrs. Akins' children, except for twenty percent of the assets which will vest in Justice Akin upon certain contingencies.

Mrs. Dahl declared that the trustee shall have a reasonable compensation, but not to exceed the fees charged by trust departments of banks in Dallas. She provided broad powers in the trustee over the trust properties, specifying that no trustee shall be liable for any mistake or error in judgment, but shall be liable only in case of bad faith or dishonesty.

The First National Bank in Dallas and Mrs. Akin are appointed successor co-trustees to Mr. Dahl. Mrs. Akin may remove the bank as co-trustee, but, in that event, she shall appoint as successor trustee a national bank having trust powers.

Factual Setting

When the trust came into being in 1961, its assets were approximately one-

half million dollars. During Mr. Dahl's tenure as trustee, he distributed to the Akins and their children trust funds amounting to more than $600,000, excluding distributions made and returned in the form of loans for the trust or to Mr. Dahl. At the time of the trial in 1980, the corpus of the trust was valued in excess of two million dollars.

Beginning in 1966, Mr. Dahl borrowed from Mrs. Akin various sums of money which had been distributed to her by the trust and evidenced by his indebtednesses by notes. In 1969, Mr. Dahl and the Akins executed an instrument "constituting a mutual understanding and agreement" concerning recited money matters, which expresses that "the general principle or method of settlement agreed upon" includes a proviso that

> Any balance of personal notes from George L. Dahl to Ted & Gloria Akin ... would continue to be held by Gloria Akin as claims to be collected from the estate of George L. Dahl upon his demise. The personal notes

> of George L. Dahl are to be renewed annually, but shall not carry any interest ...

At the time of trial, the personal notes from Mr. Dahl were in the principal amounts of $274,702.26 to Mrs. Akin, $38,500 to Mrs. Akin as trustee for George D. Akin, and $38,500 to Mrs. Akin as trustee for Laurel S. Akin.

In 1970, the Akins guaranteed $160,000 of Teletronics Industries, Inc.'s $180,000 note held by First National Bank in Dallas. In 1971, Justice Akin executed a security agreement and delivered a certificate for 12,000 shares of Hargrove Electric Company, Inc. stock to the bank, together with a stock power form executed in blank, in connection with his securing the payment of an indebtedness unrelated to the Teletronics note. The indebtedness was paid, but the stock certificate was not retrieved.

When Teletronics defaulted on its note in 1972, the bank filed suit

against the Akins. The trust then paid $107,781 to the bank to pay the balance due on the Teletronics note on behalf of the Akins. The bank assigned the Teletronics note and security agreement, together with the Akins' guaranty, to the trust. At the same time, the bank delivered to the trust the security agreement executed by Justice Akin in 1971, the Hargrove stock certificate, and the executed stock power form in blank.

The $107,781 paid by the trust was not handled as a distribution of trust funds. Later it was written off as an uncollectible account, the trust taking a tax credit.

In 1975, the trust delivered three checks totaling $318,600 to the Akins, who used the money to pay off another guaranteed Teletronics note and other debts. The delivery was not handled as a distribution of trust funds because there would have been substantial income

tax liability to the Akins. Instead, there was completed a transaction -- a "tax gimmick," in the words of Mr. Dahl's comptroller--whereby the Akins sold and conveyed a number of rental properties they owned, collectively referred to as the McKinney Street property, to the trust for $318,600, which generated a lesser capital gains tax to the Akins.

Afterwards it was discovered that title to one of the tracts, more accurately described as the Richland Hills property, was in Hargrove Electric Company, Inc. On 28 May 1975, Mr. Dahl, as trustee of the trust, and Justice Akin executed a memorandum agreement, which recited that since Justice Akin, who owned fifty percent of the authorized and issued stock of the Hargrove corporation, had theretofore pledged all of his Hargrove stock to the trust as collateral to secure any and all indebtedness he may owe the trust, the trust

would convey the property to Justice Akin as trustee with authority to convey the property to the Hargrove corporation, and that the relationship between the corporation, Justice Akin, and the trust with respect to the pledged stock would be computed and finalized by 1 July 1975.

Subsequently, the trust sold the McKinney Street property tracts, except for three of the tracts. The comptroller, giving the details of the transactions, testified that the trust "about broke even on the thing".

Litigation

Differences arose between Mr. Dahl and the Akins. Initially, the focus was on the Akins' objection to Mr. Dahl's proposed remarriage and his reaction, together with his criticism of the Akins' spending habits. In a 24 April 1978 letter to the Akins, Mr. Dahl set forth his view of the differences and

announced his severance of all relationships with the Akins.

In the interim on 28 March 1978, Mrs. Akin had filed an application for the immediate appointment of a temporary guardian for the person and estate of Mr. Dahl, who was unaware of the action. The matter was not pressed until April 20, at which time Mrs. Akin was appointed temporary guardian by a court order fixing her bond at one million dollars. She filed the bond and took the oath of office on April 21, but the instruments were not filed until the 26th of April.

Meanwhile on April 25, Mrs. Akin signed and filed an application alleging that Mr. Dahl was mentally ill and required observation and/or treatment in a mental hospital. As a result, Mr. Dahl was arrested on the court's warrant on April 26, and he was confined in a hospital for some two weeks. At a hearing on May 16, the judge dismissed the mental illness proceedings. No appeal was

taken from the May 17 judgment of dismissal.

Thereafter on 22 May 1978, Mrs. Akin amended her guardianship application to allege the need to appoint a permanent guardian of both the person and estate of Mr. Dahl upon the ground that he "is not mentally competent or physically able to attend to his personal affairs or business affairs." Upon a jury verdict that Mr. Dahl "is not of unsound mind," the court rendered judgment denying Mrs. Akin's application for permanent guardianship. On appeal, the judgment was reformed to comport with the jury's verdict and, as reformed, was affirmed. In re Guardianship of Dahl, 590 S.W.2d 191 (Tex. Civ. App.-Amarillo 1979, writ ref'd n.r.e.).

The litigation spawned the three lawsuits underlying the appeals now before us. The suits are noted in the order of filing.

First, Mr. Dahl brought an action, No. 78-11230-L on the docket of the 193rd Judicial District Court, against the Akins. By this action, Mr. Dahl sought to hold the Akins liable in damages for, among other torts, malicious prosecution.

Then, Mrs. Akin, individually and as trustee for two of the Akins' children, George D. Akin and Laurel S. Akin, each of whom individually joined in the suit, filed an action, No. 78-12590-H, on the docket of the 160th Judicial District Court, against Mr. Dahl. The object of the suit was for recovery upon three notes executed by Mr. Dahl and to recover stock of the Hargrove Electric Company, Inc. held by him as trustee for the trust.

Next, Mrs. Akin filed an action, No. 79,904-A on the docket of the 14th Judicial District Court, against Mr. Dahl. By this suit, Mrs. Akin sought the removal of Mr. Dahl as trustee of the

trust and to avoid his special power of appointment.

The suits were consolidated for trial. After hearing the evidence recorded in 2,000 pages of the statement of facts and on 56 exhibits, the jury returned its verdict on the special issues submitted for each suit in one charge.

In suit No. 78-11230-L, which the litigants refer to as the malicious prosecution suit, a monetary judgment was rendered on the jury's verdict in favor of Mr. Dahl. The Akins have appealed from the judgment in our Cause No. 9341.

In suit No. 78-12590-H, which the litigants refer to as the note suit, a judgment, rendered on the jury's verdict and the court's findings, was generally in favor of Mrs. Akin and others. Both Mr. Dahl and Mrs. Akin have appealed from the judgment in our Cause No. 9340.

In suit No. 79,904-A, which the litigants refer to as the trust suit, a judgment, rendered on the jury's verdict and

the court's finding, was adverse to Mr. Dahl. He has appealed from the judgment in our Cause No. 9339.

No. 9341--Malicious Prosecution Suit

In his live trial pleadings filed in Cause No. 78-11230-L in the 193rd Judicial District Court, Mr. Dahl sought to hold the Akins monetarily liable individually and as co-conspirators on several causes of action. The causes of action asserted were libel, slander and defamation, false or wrongful arrest, false or wrongful imprisonment, abuse of process, and malicious prosecution. He claimed both actual and exemplary damages. Actual damages asserted were: $4,000,000 for mental and physical pain and suffering, embarrassment, humiliation, damage to his name, reputation, and credit, and loss of ability to pursue his profession; $2,255 for medical expenses; and $250,000 for attorney's fees. Exemplary damages of $7,500,000 were asserted for the willful and

malicious conduct of the Akins. The Akins joined the issues by their general denial.

The evidence adduced about this unfortunate family dispute will be detailed only as necessarily appropriate to and in connection with the appellate issues. At this point, a summary suffices.

To support his pleaded operative facts, Mr. Dahl produced evidence designed to persuade the jury that: he and the Akins had numerous and heated disagreements over his interest in remarriage, particularly his proposed marriage to the lady he later married, and about their spending habits; the possibility of a subject of his bounty other than themselves and their desire to take control of his and the trust's property, rather than their concern over his mental condition, prompted the Akins to initiate, without any notice to him, temporary guardianship and mental

illness proceedings; based upon the Akins untrue allegations of mental incapacity and Mrs. Akin's application founded on legal conclusions, he was arrested and confined incommunicado in a hospital where he was subjected to humiliation and invasions of his body; on the day following his hospitalization, he was served with notice of Mrs. Akin's appointment a month previously as temporary guardian of both his person and his property; the proceedings were initiated by the Akins on half truths and outright fabrications when in fact there was neither need for his hospitalization nor the existence of facts and circumstances suggesting he was mentally incompetent or of unsound mind; the family doctor who relied on what the Akins told him in stating that competency proceedings were appropriate, had not seen Mr. Dahl in more than two years; Mr. Dahl's friends and associates, who were in frequent contact with him, were of the opinion

that he was intelligent and competent; the Akins took charge of his and the trust's properties, removing his private papers and securities which had not been returned, and disturbed his office for an audit which found nothing amiss; and that, as a result, he suffered personally and professionally, and the damage to his reputation as a world renowned architect and astute businessman established during his 86 years was irreparable.

The evidence disclosed that upon a hearing, the mental illness proceeding was dismissed without an appeal therefrom. Upon trial, the temporary guardianship was terminated and Mrs. Akin's application for permanent guardianship was denied upon the jury's verdict that Mr. Dahl is not of unsound mind. 590 S.W.2d at 194.

In turn, the Akins produced evidence designed to persuade the jury that: Mr. Dahl's physical and mental conditions

had changed in detailed particulars and to the extent that they had a sincere concern for his welfare, thinking he was mentally ill and incompetent; although Mr. Dahl's proposed marriage, about which he and Mrs. Akin had extensive disagreements, was what prompted her to initiate the guardianship and mental illness proceedings, her actions were taken because she considered his relationship with his future wife evidence of the changes taking place in her father, and it was time to do something; the family doctor considered the competency proceedings were appropriate; and three psychiatrists, after examining Mr. Dahl upon his hospitalization, concluded that he did suffer from a mental illness, regardless of anything the Akins told them. The evidence disclosed that the hospitalization of Mr. Dahl and the Akins' exercise of control over his and the trust's properties were pursuant to court orders.

Hearing the evidence, which the Akins submit is fairly summarized in our former opinion appearing in 590 S.W.2d at 198, the jury made its findings. The findings, numbered to correspond to the special issue submission, are that: (1) Mrs. Akin did not have probable cause to prosecute the guardianship proceeding, which (2) she did with malice, and (3) the Akins acted in a conspiracy with one another in planning, instituting, and maintaining the guardianship proceeding, (4) Mrs. Akin brought the mental illness proceeding without probable cause, (5) she acted with malice in causing the mental illness application to be filed, and (6) the Akins acted in a conspiracy with one another in planning, instituting, and maintaining the mental illness proceeding.

The jury fixed Mr. Dahl's actual damages at (7) $1,130,000 resulting from $1,010,000 resulting from the mental the

guardianship proceeding, [1] and (9)

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[1] Special Issue Number 7 and the jury's answers are as follows:

Find from a preponderance of the evidence that amount of money, if any, that would fairly and reasonably compensate George Leighton Dahl for the injury he received as a proximate result of the guardianship proceeding. In arriving at such amount of money, if any, you will take into consideration the following elements, and none other, to-wit:

(1) Damage, if any to his professional and personal reputation.

$550,000.00

(2) Compensation, if any, for the emotional distress, including mental pain, suffering and humiliation, resulting from the institution and prosecution of the guardianship proceeding against him.

$500,000.00

(3) Expenses, if any, including attorney's fees, reasonably and necessarily incurred by George Leighton Dahl in defending himself against the guardianship proceeding and the appeals therefrom.

$130,000.00

(4) Loss of earning capacity, if any.

$None

illness proceeding. [2/] The jury's award of exemplary damages on account of the prosecutions was (8) none for the guardianship proceeding, and (10) $500,000

2/ Special issue number 9 and the jury's answers are as follows:

> Find from a preponderance of the evidence that amount of money, if any, that would fairly and reasonably compensate George Leighton Dahl for the injury, if any, he received as a proximate result of the mental illness proceeding. In arriving at such amount of money, if any, you will take into consideration the following elements, and none other, to-wit:
>
> (1) Damage, if any, to his professional and personal reputation.
>
> $500,00.00
>
> (2) Compensation, if any, for distress, if any, including physical and mental pain, if any, suffering and humiliation, if any, resulting from the institution and prosecution of the mental illness proceeding and his arrest and incarceration from April 26, 1978 until May 12, 1978 in connection therewith, if any.
>
> $500,000.00
>
> (3) Expenses, if any, including attorney's fees, if any, including attorney's fees reasonably and necessarily incurred by George Leighton Dahl in defending himself in the mental illness proceeding.
>
> $ 10,000.00
>
> (4) Loss of earning capacity, if any.
>
> None

for the mental illness proceeding.

The court rendered judgment on the jury's verdict, decreeing that Mr. Dahl recover from the Akins, jointly and severally, the amount of $2,640,000 awarded by the jury. Later, upon the court's suggestion of remittitur totalling $1,450,000 [3/] as a condition of not granting a new trial, and Mr. Dahl's remittance of that amount, the court confirmed the judgment balance to be the sum of $1,190,000.

Appealing from the judgment, the Akins have drafted ten points of error which, albeit manifold, present complaints that have been preserved for appellate review. Mr. Dahl has a cross-

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3/ The court suggested a remittitur of $400,000 of each of the $500,000 awards of actual damages by the jury's answers to special issues nos. 7(1), 7(2), and 9(1), which are recorded in marginal notes 1 and 2, and a remittitur of $250,000 of the $500,000 award of exemplary damages.

point by which he complains that the court erred in ordering the remittitur.

Initially, the Akins challenge the legal and factual sufficiency of the evidence to support the jury's finding that Mrs. Akin had acted without probable cause in bringing the guardianship and the mental illness proceedings, contending that probable cause was established by the evidence. 4/ The question here, they offer, is whether medical opinion and facts which might have supported a jury verdict that Mr. Dahl

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4/ It was Mr. Dahl's burden to persuade the jury to find, as he did, that Mrs. Akin did not have probable cause to prosecute the guardianship proceeding, and that she brought the mental illness proceeding without probable cause. In deciding the contention that the evidence is legally insufficient to support the jury's findings, we will, as we must, consider only the evidence and inferences tending to support the findings and disregard all evidence and inferences to the contrary. In deciding the contention that the evidence is factually insufficient to support the jury's findings, we will, again as we

lacked competency are sufficient to establish probable cause for Mrs. Akin's having brought the proceedings.

However, the controlling question, and the one submitted to the jury, is not so narrow. The court gave the traditional meaning of probable cause

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must, consider all of the evidence to determine whether the evidence supporting the findings is so weak or the evidence to the contrary is so overwhelming that the findings, or either of them, should be set aside. Garza v. Alvair, 395 S.W.2d 821, 823 (Tex. 1965). The affirmative findings of want of probable cause are not subject to the Akins' contention that probable cause was established by the evidence. A contention that the evidence conclusively establishes the opposite of the vital fact is proper only where the jury finds the non-existence, or fails to find the existence, of the fact vital to a claim or to a defense. See Calvert, "No Evidence" and "Insufficient Evidence" Points of Error, 38 Tex. L. Rev. 361, 362-64 (1960).

albeit tailored to each proceeding, [5]

and the Akins made no objection to the

[5] In connection with special issue number 1, the Court instructed that

> [T]he term "probable cause" means the existence of such facts and circumstances that would excite the belief in a reasonable mind, acting on the facts within his or her knowledge that at the time in question George Leighton Dahl was a person of unsound mind or a person mentally incompetent to care for himself or to manage his property and financial affairs and required the immediate appointment of a guardian. Further, you are instructed that a person filing a temporary guardianship application may also rely upon information derived from others if such information comes from those who have an opportunity to know, and comes for a credible source, and is accepted by the applicant in good faith, and he or she believes such information to be true, acting as a reasonably prudent person would act under the facts and circumstances. You are further instructed that the verdict returned by the jury in the guardianship case is not to be considered by you for any purpose.

And, in connection with special issue number 4 that

> [T]he term "probable cause" means the existence of such facts and circumstances that would excite the belief in a reasonable mind, acting on the facts within his or her knowledge that at the time of the

to the instructions. [6/] Thus, the determination to be made is whether the required evidential support exists for the findings made by the jury to the probable cause issues submitted to it.

It does not profit to extract and dissect further details from the evidence. Suffice it to state that, given the evidence of medical opinion and

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institution of the mental illness proceeding that George Leighton Dahl's mental health was substantially impaired and because of this he was likely to injure himself or others if not immediately restrained. Further, you are instructed that a person filing a mental illness application may also rely upon information derived from others if such information comes from those who have an opportunity to know, and comes from a credible source, and is accepted by the applicant in good faith, and he or she believes such information to be true, acting as a reasonably prudent person would act under the facts and circumstances. You are further instructed that you are not to consider for any purpose that the mental illness proceeding was dismissed.

6/ It was Mr. Dahl who objected to the instructions, submitting that they permitted consideration of hearsay and excluded consideration of the disposition of the prior proceedings.

testimonial facts bearing on incompetency adduced and referred to by the Akins, the jury was not bound to credit it with more weight than the produced evidence of competency. Compare Coxson v. Atlanta Life Ins. Co., 142 Tex. 544, 179 S.W.2d 943, 945 (1944).

The competency evidence was directed toward showing that at the pertinent times, Mr. Dahl's mental health was not, and there was no reasonable basis in the known facts for a belief that it was, substantially impaired, and that he was mentally competent to manage his person and business affairs. See, e.g., Pendleton v. Burkhalter, 432 S.W.2d 724, 731 (Tex. Civ. App.-Houston [1st Dist.] 1968, writ ref'd n.r.e.). Of importance for the jury's consideration was the evidence bearing on the question whether Mrs. Akin did or did not in good faith make a full and fair disclosure of all

of the facts and circumstances known to her in bringing the guardianship and mental illness proceedings. See, e.g., Eans v. Grocer Supply Co., Inc., 580 S.W.2d 17, 21 (Tex. Civ. App.-Houston [1st Dist.] 1979, no writ).

[1] Consequently, there being some evidence of want of probable cause, whether facts existed establishing the lack of probable cause was for the jury's determination under appropriate instructions as to what facts constitute probable cause. 1 R. Ray, Texas Law of Evidence § 7 (Texas Practice 3d ed. 1980). The jury's findings established want of probable cause and, after considering the evidence under the standards of review applicable to each appropriate challenge to the findings, we cannot say the jury's findings are faulty.

[2,3] The want of probable cause find-

ings are not vulnerable to the Akins' further contention that probable cause should be held to exist in this cause because

> "the temporary guardianship and mental illness commitment [sic] were brought upon orders issued by the courts of this state after a judge had heard the evidence sufficient to authorize these preliminary actions."

Notwithstanding the court orders, no one has the right or authority, under the law, to start a malicious prosecution; and, when one maliciously sets in motion the machinery of the law in a wrongful prosecution resulting in damage, an action for malicious prosecution will lie. Therefore, in a malicious prosecution action, it is no defense to say that the prosecution was in the course of a judicial proceeding before a court of competent jurisdiction. Suhre v. Kott, 193 S.W. 417, 419 (Tex. Civ. App.-San Antonio 1917, no writ). The first

point of error is overruled.

[4] Neither can we, as the Akins urge we should, fault the evidence as being legally or factually insufficient to support the jury's findings that Mrs. Akin acted with malice. It has been a long establish principle that the jury may infer malice from the proof of want of probable cause, even though the jury should not be, and it was not in this cause, so instructed. Biering v. First Nat. Bank, 69 Tex. 599, 7 S.W. 90,92 (1888).

Moreover, although there is no direct record evidence of malice per se, there is record evidence of circumstances bearing on malice. The jury heard the details of the Akins' objections to Mr. Dahl's consideration of remarriage and of his complaints concerning their financial irresponsibility; the evidence touching on whether the representations made by the Akins for the initiation of the guardianship and mental illness pro-

ceedings were full and truthful; the character of the actions taken by the Akins leading to and during the proceedings, and the likely motivations therefor; the nature of the allegations upon which the Akins based the two proceedings and the explanations that the allegations, if true, were attributable to circumstances other than mental incapacity; and the degree to which the initiation of those proceedings curtailed Mr. Dahl's personal liberty and interfered with the exercise of his property rights until the proceedings were terminated favorable to Mr. Dahl. The circumstances, measured by the court's instruction that malice "means ill will or evil motive or such gross indifference or reckless disregard for the rights of others as to amount to wanton and willful action, knowingly and unreasonably done," are sufficient for the jury to infer malice. J.D. Penney v. Gilford,

422 S.W.2d 25, 28 (Tex. Civ. App.-Houston [1st Dist.] 1967, writ ref'd n.r.e.). The second point is overruled.

By the third point, the Akins charge the court with double error in rendering a personal and individual judgment against Justice Akin. First, they contend that the evidence is legally and factually insufficient to support the jury's findings that the Akins acted in a conspiracy with one another in planning, instituting and maintaining, respectively, the guardianship proceeding and the mental illness proceeding. Second, they contend that without a finding that Justice Akin acted with malice, the conspiracy findings are inadequate to establish a cause of action against him.

In support of the evidential insufficiency contention, the Akins tender this evidence: Justice Akin contacted some people to inquire about their thoughts concerning Mr. Dahl's mental capacity; he was instrumental in recommending and

obtaining a lawyer for Mrs. Akin; and he supported her in her efforts, concurring with her in her observations regarding her father's condition and judgment. It is then argued that this evidence shows only what a normal husband would have done; therefore, they conclude, the evidence falls far short of evincing a conspiracy the court defined to be "a combination of two or more persons who, acting in concert, accomplish an unlawful purpose or accomplish a purpose not itself unlawful but do so by unlawful means."

Yet, the foregoing is not the only evidence of Justice Akins' activities presented for the jury's consideration. The jury heard that he independently decided that Mr. Dahl was incompetent and communicated that decision to Mrs. Akin. He not only recommended and obtained a lawyer for Mrs. Akin, but he met with the lawyer, either alone or with Mrs. Akin, on almost a daily basis

for a period of more than two months extending from before the initiation of the temporary guardianship proceeding until after the mental illness proceeding was dismissed. He made two telephone calls to Mr. Dahl's attorney in relation to a premarital agreement between Mr. Dahl and the lady Mr. Dahl later married. Justice Akin made, or had someone in his office make, daily inquiries to the county clerk's office to ascertain if Mr. Dahl had obtained a marriage license. The items that he and Mrs. Akin took from Mr. Dahl's office and apartment during Mr. Dahl's hospitalization were selected by Justice Akin for the purpose of trial preparation.

Furthermore, Justice Akin, prior to the initiation of the mental illness proceeding, had a meeting with Judge Ashmore, a probate judge. The justice told Judge Ashmore that Mr. Dahl had been doing some strange things, but more than that, Mr. Dahl was supposed to be

taking medication, and if he did not get it, he stood a likely chance of having a heart attack. 7/ Justice Akin added that Mr. Dahl had taken up with some lady (the lady Mr. Dahl subsequently married), who was exercising undue influence on him by encouraging him not to take any medication. Judge Ashmore recalled that Justice Akin said she had gotten Mr. Dahl to quit taking the medication without which, the doctors told the Akins, his life was in danger.

That information, Judge Ashmore said, was the basis for his signing the warrant to arrest and hospitalize Mr. Dahl upon Mrs. Akin's application, the judge stating "that if I didn't get him in the hospital ... the man was going to die if he didn't get medication." In the

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7/ In the present action, Mrs. Akin testified that a doctor had prescribed pills for her father, but that she "didn't know what the pills did."

Judge's opinion, no other allegation in the application for hospitalization would be grounds for him to sign a warrant and, if the allegations were not true, there would have been nothing before him.

Judge Ashmore testified that when he later asked about Mr. Dahl, Justice Akin said he was in the hospital taking medication. Thereafter, in a hearing before Judge Ashmore, a doctor testified that Mr. Dahl had received no medication. The testimony that Mr. Dahl was no longer receiving medication or never received medication [8/] was one of the things on which Judge Ashmore based his decision to dismiss the mental illness

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8/ Testifying in the present action, Mr. Dahl said a doctor gave him a pill several years ago and recommended that he take that as long as he lived, but "I haven't taken that pill for three or four years and I'm still living."

proceeding. 9/

[5] These evidential excerpts are, if credited by the jury, evidence that together, the Akins had a meeting of their minds on planning, instituting, and maintaining the guardianship and mental illness proceedings. The evidence, together with the evidence sustaining the findings of Mrs. Akin's want of probable cause and her malice, constitute some evidence of probative force to support the jury's findings of conspiracy. The force of the evidence is not blunted by the absence of an open declaration of the conspiracy, for a conspiracy may be, and usually must be, proved circumstantially. Schlumberger Well Sur. Corp. v. Nortex Oil & G. Corp., 435 S.W.2d 854, 858 (Tex. 1968).

9/ The decision to dismiss was confirmed when Judge Ashmore talked with Mr. Dahl in chambers and the judge found Mr. Dahl to be dapper looking with a sharp memory, particularly as to recall, and in good shape for an eighty year old man.

After considering all of the evidence before the jury, we cannot say that the evidence is so weak or the evidence to the contrary is so overwhelming that the conspiracy findings, or either of them, should be set aside.

[6,7] Neither are we in accord with the Akins' bare statement under the point that without a finding that Justice Akin acted with malice, the conspiracy findings are inadequate to establish a cause of action against him. The gist of a cause of action for civil conspiracy is the damage from the commission of a wrong which injures another, and not the conspiracy itself. Id. at 856; Estate of Stonecipher v. Estate of Butts, 591 S.W.2d 806, 808 (Tex. 1979). Where a plaintiff has a cause of action against one of the conspirators individually, such as Mr. Dahl proved against Mrs. Akin, he may then maintain an action for the conspiracy, Delz v. Winfree, 80 Tex. 400, 16 S.W. 111, 112

(1891), the liability for which is joint. Nortex Oil & Gas Corporation v. Clark, 369 S.W.2d 671, 674 (Tex. Civ. App.-Dallas 1963, no writ). The third point is overruled.

Next, the Akins urge as error that special issues nos. 7(1)(2) and 9(1)(2), reproduced in marginal notes 1 and 2, allow the double recovery of damages for identical elements of damages occurring over a concurrent period of time. Reliance is had upon Huggins v. Carey, 108 Tex. 358, 194 S.W. 133 (1917), and Grissom v. Lopez, 280 S.W. 613 (Tex. Civ. App.-San Antonio 1926, writ dism'd). The cases are inapposite.

In Huggins, the court's charge erroneously authorized the jury to assess damages twice for the same elements involved in a single cause of action for breach of a marriage contract. 194 S.W. at 134-35. In Grissom, the court's charge erroneously divided the damages for one malicious prosecution into two

causes of action, causing the jury to believe that every phase of the case demanded separate damages. 280 S.W. at 614. Neither of those situations is presented by the record before us.

[8] Although mental and physical incapacity and mental illness may coexist, there is an important distinction between them, In re Guardianship of Berry, 515 S.W.2d 12, 13 (Tex. Civ. App.- Dallas 1974, no writ), and, in the cause at bar, different objects were sought to be achieved by allegations of the existence of each. By the guardianship proceeding, the control of Mr. Dahl's person and property, as well as the property of the trust for which he was trustee, was sought; by the mental illness proceeding, the hospitalization of Mr. Dahl was sought. Mr. Dahl sued for damages for the malicious prosecution of each proceeding. The jury made findings, which we have sustained against the attacks made on them, that

established a malicious prosecution of each proceeding.

It is axiomatic that one who is maliciously prosecuted is entitled to damages occasioned by the prosecution. McManus v. Wallis, 52 Tex. 534, 546 (1880). In submitting the questions of damages to the jury, the court was careful to instruct the jury on the compensable elements that could be considered in arriving at damages, if any, attributable to each proceeding. Although the elements of damages for each are similar, the propriety of the elements is not challenged. The jury's verdict manifests a segregation of the damages it found to result from the guardianship proceeding from the damages it found to flow from the mental illness proceeding. Thus, rather than allowing a double recovery, the court's submission only authorized compensation for the elements of the particular injury. An injured party is entitled to that recovery.

Davis v. Teague, 256 S.W. 957, 961 (Tex. Civ. App.-Beaumont 1923, writ dism'd). The fourth point is overruled.

For avoidance of the award of exemplary damages, the Akins cite the principle that where the authorities, after an honest and full disclosure, initiate a prosecution, no action of malicious prosecution will lie against the discloser. Sebastian v. Cheney, 86 Tex. 497, 25 S.W. 691, 692 (1894). We, of course, accept the principle, but not, contrary to the Akins' fifth contention, its application to the mental illness proceeding part of this cause to avoid the award of exemplary damages made in answer to special issue no. 20.

[9] The jury made findings, which we have upheld, that implicitly negate an honest and full disclosure of the facts and circumstances known when the guardianship and mental illness proceedings were brought. The jury's findings establish that the mental illness

proceeding was a malicious prosecution. It long has been the rule in Texas that a suit for malicious prosecution admits the recovery of exemplary damages in the nature of a penalty. McManus v. Wallis, supra, at 547. Accord, Jameson v. Zuehlke, 218 S.W.2d 326 (Tex. Civ. App.-Waco 1948, writ ref'd n.r.e.). The fifth point is overruled.

[10] It was evidenced that Mrs. Akin filed the guardianship proceeding on 28 March 1978 and filed her bond and took the oath of office on the 26th of April. An unsuccessful objection was made to special issue no. 1 on the ground that it does not designate April 26 as the date for determination of the probable cause issue. The Akins now contend, by

their points six [10] and seven, but without citation of supporting authority, that the submission was erroneous. They argue that there is no cause of action for malicious prosecution arising from the mere filing of a guardianship proceeding; instead, they state, that for there to be a cause of action, there must be some action by which the ward is deprived of property or liberty which, in this instance, was on 26 April 1978, when Mrs. Akin qualified as guardian. We disagree.

Presumably, the argument is referenced to the principle that in Texas, damages for prosecution of civil suits with malice and without probable cause

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10/ Coupled with the sixth point are complaints directed to special issue no. 2 and to the instruction accompanying special issue no. 1. However, inasmuch as these complaints were not voiced to the trial court during the Akins' objections to the charge, they are waived. Tex. R. Civ. Pro 274; Davis v. Campbell, 572 S.W.2d 660, 663 (Tex. 1978).

cannot be recovered unless the person sued suffers some interference, by reason of the suit, with his person or property. Pye v. Cardwell, 110 Tex. 572, 222, S.W. 153 (1920); Louis v. Blalock, 543 S.W.2d 715, 719 (Tex. Civ. App.-Amarillo 1976, writ ref'd n.r.e.). But the principle is not associated with the inquiry posed by special issue no. 1. Rather, the inquiry was whether Mrs. Akin "did not have probable cause to prosecute the guardianship proceeding?" The issues, and its accompanying instruction as quoted in marginal note 5, both comport with accepted authority that the accountability for malicious prosecution commences when the prosecution is instigated. Gulf, C. & S.F. Ry. Co. v. James, 73 Tex. 12, 10 S.W. 744, 748 (1889), or the suit is instituted, Suhre v. Kott, supra, at 418, which generally is when the charging instrument is filed, Shannon v. Jones, 76 Tex. 141, 13 S.W. 477, 479 (1890), purposely setting

in operation the machinery of law. Daughtry v. Blanket State Bank, 41 S.W.2d 527, 530 (Tex. Civ. App.-Austin 1931, no writ). The points are overruled.

[11] Attempting an analogy between Mr. Dahl's suit and one for malicious prosecution in a criminal matter, 11/ the Akins propose they were entitled to judgment because Mr. Dahl was obligated to prove he was of sound mind and had no mental illness, neither of which he proved. We do not subscribe to the proposition.

Respectable authority has stated that the elements required to establish an action for malicious prosecution are that a suit was instituted with malice,

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11/ A suit for malicious prosecution in a criminal matter requires, according to the Akins' citation of Parker v. Dallas Hunting and Fishing Club, 463 S.W.2d 496 (Tex. Civ. App.-Dallas 1971, no writ), and other cases, these elements: "(1) the commencement of a criminal prosecution against plaintiff; (2) which has been caused by the defendant or through defen-

that it was brought without probable cause, and the suit was terminated in favor of the plaintiff. 12/ Suhre v. Kott, supra, at 418, and authorities there cited. Of course, the statement presupposes that the malicious prosecution caused damages, Id., for the action falls unless the injured party pleads and proves damages resulting from some interference, by reason of the suit, with his person or property. Pye

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dant's aid or cooperation; (3) which terminated in favor of the plaintiff by acquittal; (4) that plaintiff was innocent or not guilty of the charge against him; (5) that there was no probable cause for such proceeding; (6) that it was done with malice; and (7) which resulted in damages to plaintiff." Id. at 499.

12/ These same basic elements, as contrasted with the elements listed in marginal note 11, have been stated as also applicable for a malicious prosecution action arising from an unsuccessful criminal prosecution. J.D. Penney Company v. Gilford, 422 S.W.2d 25, 28 (Tex. Civ. App.-Houston [1st Dist.] 1967, writ ref'd n.r.e.).

v. Cardwell, supra. 13/

As is evident from Suhre, the requisite elements are not enlarged to require proof of sanity and negation of mental illness by the fact that the basis of the malicious prosecution was a proceeding to establish mental incapacity. It is understandable when it is remembered that the law presumes an adult person to be of sound mind and capable of managing his own affairs, Lindly v. Lindly, 102 Tex. 135, 113 S.W. 750, 753 (1908), a presumption that obtains until and unless a party alleging the mental incapacity of the adult proves the allegation. Hall v. Hall,

13/ The requisite elements recently were enumerated differently by the Supreme Court in these words: "1) the institution or continuation of judicial proceedings; 2) by, or at the instance of the defendant(s); 3) malice in the commencement of the proceedings; 4) lack of probable cause for the proceedings; 5) termination of the proceedings in plaintiff's favor; and 6) damages." James v. Brown, 637 S.W.2d 914, 918 (Tex. 1982).

352 S.W.2d 765, 767, (Tex. Civ. App.-Houston 1962, no writ). It follows that Mr. Dahl had no legal obligation to prove the soundness of his mental condition. The eighth point is overruled.

With their final two points, the Akins attack the verdict for damages. They argue briefly and generally, sans citation of authority and without specificity as to any of the elements passed on by the jury, that even with the trial court remittitur, the damages are so excessive that either a new trial or a further substantial remittitur is required. By his cross-point, Mr. Dahl asks that we restore the amount of damages remitted in the trial court.

Preliminarily, we observe that the Akins' two points do not comply with the specificity requirements of Rule 418, Texas Rules of Civil Procedure, and, therefore, they could be considered to be waived. Burgess v. Sylvester, 143 Tex. 25, 182 S.W.2d 358, 360 (1944);

Hatch v. Davis, 621 S.W.2d 443, 447 (Tex. Civ. App.-Corpus Christi 1981, writ ref'd n.r.e.). Still, the question of excessive damages was preserved for appellate review, and the points do direct our attention to the question raised; consequently, we will pass on the merits of the points, O'Neil v. Mack Trucks, Inc., 542 S.W.2d 112, 114 (Tex. 1976), particularly since Mr. Dahl has responded to the points without objecting to their sufficiency. Williford v. Sharpe, 578 S.W.2d 498, 499 (Tex. Civ. App.-Texarkana 1979, no writ).

[12] However, it is not made to appear that we have jurisdiction to entertain Mr. Dahl's cross-point. Mr. Dahl has neither asserted nor have we noticed in the record that he made any complaint in the trial court as to the final judgment rendered, or that he gave notice of appeal therefrom. As a result, Mr. Dahl is in no position to now complain of the action of the trial court in effecting

the remittitur and, therefore, we do not have jurisdiction to entertain his cross-point. Texas Oil & Gas Corporation v. Vela, 429 S.W.2d 866, 881 (Tex. 1968); West Texas Utilities Company v. Irvin, 161 Tex. 5, 336 S.W.2d 609, 611 (1960). The cross-point must be overruled.

Before arriving at its verdict for damages, the jury also had heard that Mr. Dahl, then 86 years of age, had achieved, before institution of the guardianship and mental illness proceedings, international stature as an outstanding architect, winning many design awards and professionally handling over a billion dollars of architectural work. He was the architect for private, county, and federal buildings in Dallas. He was the managing architect for all of the buildings for the 1936 Texas Centennial in Dallas, and participated in the design of the Cotton Bowl. Mr. Dahl served as architect for some seventeen of the buildings at the University of

Texas in Austin, and for the recreational center on the East Texas University campus. He designed and built the 30 million dollar LTV Aerospace Center in Grand Prairie, which required innovation, imagination, and change. He is a member of the College of Fellows of the American Institute of Architects, an honor afforded only two percent of the architects in the nation.

Interrelated was testimony of Mr. Dahl's success as a businessman. Illustratively, he quadrupled the size of the trust to its present market value of at least two million dollars after distributions of almost one million dollars.

Mr. Dahl testified to the experience he underwent while hospitalized, saying that he suffered mental anguish, pain and tremendous sorrow and sadness from being incarcerated and charged with incompetence and in need of a guardian. He had great doubts about his employability after "going through all of the

terrible publicity" of the incompetency charges, but he did concede he was employable as an architect in a consulting capacity, thinking he can qualify and do his work satisfactorily. But for the charges and institution of litigation by the Akins, he said he could be earning about $100,000 a year as an architect. He added that he had paid, as a result of the proceedings, over $200,000 in expenses.

Other witnesses gave testimony that the litigation instituted against Mr. Dahl had a damaging monetary effect and was damaging to the reputation of an architect. The institution of the proceedings was, according to an engineer witness, known in the community and was harmful, as well as, in the opinion of a banker witness, possibly injurious to Mr. Dahl's ability to obtain credit. An architect witness characterized the effect of the proceedings as detrimental,

staggering, and irreparable, which could not be measured in money.

Having heard all of the evidence, the jury returned a verdict of $1,130,000 actual damages for malicious prosecution of the guardianship proceeding, allocating $500,000 as damages to Mr. Dahl's professional and personal reputation, $500,000 as compensation for his emotional distress, and $130,000 for his reasonable and necessary expenses, including attorney's fees. The jury declined to award any compensation for the element of loss of earning capacity or as exemplary damages.

Having heard the same evidence, the court suggested, and Mr. Dahl acquiesced to, a remittitur of $400,000 of each $500,000 the jury allocated for, respectively, reputation damages and emotional distress compensation. Resultantly, the verdict of damages arising from the guardianship proceeding became the following: $100,000 as reputation damages,

$100,000 as emotional distress compensation, and $130,000 for expenses.

Also on the evidence, the jury returned a verdict of actual damages of $1,010,000 for malicious prosecution of the mental illness proceeding, allocating $500,000 as damages to Mr. Dahl's professional and personal reputation, $500,000 as compensation for physical and emotional distress, and $10,000 for his reasonable and necessary expenses, including attorney's fees. The jury also declined to award any compensation for loss of earning capacity, but did award $500,000 as exemplary damages.

On the same evidence, the court suggested, and Mr. Dahl acquiesced to, a remittitur of $400,000 of the $500,000 the jury allocated for reputation damages, and $250,000 of the $500,000 the jury awarded as exemplary damages. Resultantly, the verdict of damages arising from the mental illness proceeding became the following: $100,000 as

reputation damages, $500,000 as physical and emotional distress compensation, $10,000 for expenses, and $250,000 as exemplary damages.

[13] Early, it was established that the reasonable expenses necessarily incurred in defending a malicious prosecution may be recovered as actual damages. Curlee v. Rose, 27 Tex. Civ. App. 259, 65 S.W. 197, 198 (Tex. Civ. App.-1901, no writ). Those expenses, which include attorney's fees, still are recoverable. Eans v. Grocer Supply Co., Inc., 580 S.W.2d 17, 23 (Tex. Civ. App.-Houston [1st Dist.] 1979, no writ). There is record evidence that Mr. Dahl's reasonable and necessary attorney's fees and expenses for defending the guardianship and mental illness proceedings were, respectively, $139,064.27 and $10,516.43, each of which exceeds the respective amounts found by the jury. There is no direct challenge to the basis for the jury's awards of expenses.

Hence, this portion of the verdict is not vulnerable to the Akins' attack on the monetary awards for excessiveness.

The inquiry, then, is whether the monetary recoveries decreed in the judgment to compensate Mr. Dahl for damage to his professional and personal reputation and for his emotional and physical distress, and for exemplary damages, are excessive under the facts of this cause. In deciding the question, all we can do is exercise sound judicial judgment and discretion in ascertaining what amounts would be reasonable compensation for the injuries sustained. Once the reasonable compensation is determined, any excess above that amount is subject to remittitur. Wilson v. Freeman, 108 Tex. 121, 185 S.W. 993, 994 (1916).

There is no certain measure of damages for the varying degrees of harm caused to reputations or distress inflicted on persons by malicious prosecutions. Hence, in such instances, the

measure of damages generally rests in the composite judgment and conscience of the jury. Norwood Bldg. v. Jackson, 175 S.W.2d 262, 266 (Tex. Civ. App.-Waco 1943, writ ref'd w.o.m.). Because the limits of the jury's discretion are vaguely defined, it often is said that in the absence of circumstances tending to show that the jury's award was the result of an improper motive, or the award is so excessive as to shock the court's sense of justice, the jury's verdict should not be disturbed, Eans v. Grocer Supply Co., Inc., supra, at 23, if there is any probative evidence to sustain the award. Texas Const. Service Co. of Austin v. Allen, 635 S.W.2d 810, 812 (Tex. App.-Corpus Christi 1982, writ ref'd n.r.e.).

[14] Nevertheless, a trial court may exercise its sound judicial judgment and discretion to ascertain what amount would be reasonable compensation for the injury sustained, and treat the balance

of the damages found by the jury as excess. Upon determining an amount that would be reasonable compensation, the court should authorize a remittitur of the excess. Flanigan v. Carswell, 159 Tex. 598, 324 S.W.2d 835, 840 (1959). This is what the trial court did.

In determining actual damages resulting from malicious prosecutions, the evidence bearing on injury to reputation and to mental and physical distress, and the reasonable inferences drawn therefrom, are entitled to consideration. Equitable Life Assur. Society v. Lester, 110 S.W. 499, 502 (Tex. Civ. App.-1908, no writ). The evidence heretofore summarized not only contains direct testimony of damage to Mr. Dahl's professional and personal reputations, but it supports the reasonable inference that his reputations were grossly injured, by the fact that he was maliciously prosecuted. Green v. Meadows, 527 S.W.2d 496, 499 (Tex. Civ. App.-Houston [1st Dist.]

1975, writ ref'd n.r.). Furthermore, Mr. Dahl's testimony of the circumstances of the malicious prosecutions and their effects on him supports the finding that he suffered mental and physical distress therefrom. The measurement of the distress in monetary terms is a discretionary one. Id.

[15] In determining exemplary damages, the nature of the wrong, the character of the conduct involved, the degree of culpability of the wrongdoers, the situation and sensibilities of the parties concerned, and the extent to which such conduct affects a public sense of justice and propriety, are proper matters for consideration. First Security Bank & Trust Co. v. Roach, 493 S.W.2d 612, 619 (Tex. Civ. App.-Dallas 1973, writ ref'd n.r.e.). All of these matters were raised by the evidence and the reasonable inferences flowing therefrom. Again, there is no precise measurement in monetary terms of exemplary

damages and, again, the measurement is a discretionary one, Id., although the amount of exemplary damages should be reasonably proportioned to the actual damages found. Southwestern Investment Company v. Neeley, 452 S.W.2d 705, 707 (Tex. 1970). Moreover, when a party is entitled to exemplary damages in an action for malicious prosecution, the jury may consider his expenses, including his attorney's fees, in prosecuting the action. Landa v. Obert, 45 Tex. 539, 544 (1876). There was evidence that Mr. Dahl's attorney's fees and expenses at the time of trial were, respectively, $37,040.50 and $2,231.19, a total of $39,271.69.

[16] Throughout our consideration of the question whether the damages decreed are excessive, we have been midful that it was the jury and the trial court, not us, who saw the witnesses, heard them testify, and were in the best position to judge their credibility and the

weight to be given their testimony. Given the evidence and the jury's composite judgment thereon, the trial court's ascertainment of the reasonable compensation for the injuries sustained the effected remittitur of the excess thereof, the ratio between actual and exemplary damages, and our standard of review, we are unable to say that the damages decreed, or any portion of them, are so excessive as to require a further remittitur. Points nine and ten are overruled.

The judgment rendered in Cause No. 78-11230-L is affirmed.

* * * * *

(1) Opposed submitting issue of probable cause to jury. Reference Petition, p.11(1). Note: Mr. McDaniel was trial counsel for Petitioners.

> MR.McDANIEL: All right, and I also want to argue a little bit on the probable cause issue, because I want it very clear in the record that

we are not abandoning that. I did not file --

THE COURT: I understand that.

MR. McDANIEL: I know you understand it, but I just want to make sure that the appellate court understands it. The case as we began it has this issue in it, and I did not file a motion for directed verdict on that or a motion before judgment to exclude it from going to the jury, because you indicated that you were going to submit it to the jury and we could argue about that on motion for judgment, which was properly presented, and I think that the record is sufficient on that issue to predicate my point on appeal.

TRANSCRIPT, HEARING ON MOTION FOR JUDGMENT, JULY 24, 1980, PP. 32-33.

* * * * *

(2) Argued to the Court the chill on the free access to the courts. Note: Mr. Wright was co-counsel in the trial court for Petitioners. Reference Petition, p. 11(2).

MR. WRIGHT: Would you let me finish? Mrs. Akin testified that she tried to get her father to go to the doctor. The doctor that hadn't seen him, the testimony shows, came down and testified

that based on his knowledge of the medical history of this man and based upon the type of symptoms described by Mrs. Akin, he needed to be confined for medical and mental examination. And he was confined and then these doctors come back in and make examination and have information of physical findings that existed back prior, that would account for these types of conduct; and these types of conduct would be evidence of mental illness. And I submit that we've got a right to show it all. Otherwise, anybody that ever files one of these would be subject to having their bowels laid wide open.

MR. BICKEL: Which they ought to be, Your Honor --

MR. WRIGHT: When they honestly believe --

MR. BICKEL: When they have probable cause.

MR. WRIGHT: You say she's lying about this and we've got the right to show the facts.

RECORD, P. 1393-1394.

* * * * *

(3) Argued that no evidence was introduced nor a finding made that Petitioners made less than honest and full disclosure in commencing the

earlier proceedings, so that the jury findings could not be sustained and probable cause must be found as a matter of law. Reference Petition, p. 11 (3).

> MR. McDANIEL: ...Now, its our position that there simply is no evidence of the want of probable cause in the case. There are certain innuendos created, there are certain questions of motive, all of which go to malice, and none of them really go to the want of probable cause. They have sought to prove and perhaps convince the jury that the Akins are not trustworthy witnesses, but the things that the Akins related to the doctors and to the judges were proved up by testimony of disinterested witnesses, who were not impeached. And the question is whether or not that information was sufficient to constitute probable cause.' .....

TRANSCRIPT, HEARING ON MOTION FOR JUDGMENT, JULY 24, 1980, P. 34.

* * * * *

> MR. McDANIEL: That's correct. Let me say that our motion, as you are aware, raises points of no evidence and insufficient evidence against greater weight and preponderance points on the question of probable cause, in both issue one and issue four, issue four being the mental

illness form. I have argued consistently, I do argue now -- I don't think you want to hear me out in full again, because you have heard me argue it before -- that the probable cause issue first and foremost is an issue of law for the court, and if there are enough undisputed facts in the case to establish facts as would constitute probable cause, then that is not an issue for the jury. Now, you indicated on the hearing that we had on the motion for judgment that the thing that concerned you about that was whether or not she had made a full disclosure, and that is an appropriate area of inquiry, because the cases are clear that if she makes full disclosure she is protected, and if she does not make full disclosure, if she conceals some of the facts, she is not protected. On the evidence, though, I have argued and will argue now that there is absolutely no evidence, as opposed to arguing, there is no evidence showing that she did not make full disclosure to all these people, and that every witness that testified, the judges and the doctors all testified to what she told them. She told them about the marriage, she told them about everything else Mr. Bickel asked her about.

TRANSCRIPT, HEARING ON MOTION FOR NEW TRIAL, SEPT. 25, 1980, PP. 30-31.

* * * * *

MR. McDANIEL: Here is the issue, apparently, that he's talking about, or here is one of them. "Do you find from a preponderance of the evidence that Gloria Akin made false or misleading statements with reference to the mental competency of George Leighton Dahl to Dr. Harville and Judge Jackson on or prior to the 20th day of April, 1978?" And that was refused. I do not recall what objections, if any, were lodged to that. .....But I think we could have honestly made the objection, and probably did, that there was no evidence to support the submission of that, and indeed it is our position that there is no evidence to support it, and certainly that those jury answers are against the great weight and preponderance of the evidence on the thing.

TRANSCRIPT, HEARING ON MOTION FOR NEW TRIAL, SEPT. 25, 1980, PP. 35-36

* * * * *

MR. McDANIEL: He assisted her all right, there is no question about that, but let's look at how you define conspiracy. It's the accomplishment for an unlawful purpose, or to accomplish a purpose not itself unlawful, but to do so by unlawful means. Where is there anything unlawful in this matter?

MR. MOUNT: False swearing, for openers.

MR. McDANIEL: Well, he's not accused of false swearing.

MR. BICKEL: He is accused of false swearing.

MR. McDANIEL: Wait a minute, he's not. We're not talking about false swearing. What is there about a guardianship proceeding which is unlawful, and what was done, what does the evidence show was done to accomplish the guardianship that was unlawful? All the evidence shows in this case is that he assisted his wife in hiring a lawyer, and that he supported her, and that he came over with her to talk to the county judge. There is absolutely no evidence that he did anything unlawful, nor is there any evidence whatsoever to show that he did anything whatsoever other than what any husband would have done had his wife been contemplating a proceeding of this nature against one of the members of her family. If we have got conspiracy for an unlawful purpose, or to accomplish an unlawful purpose or end in this case, then any time one of the spouses contemplates a guardianship proceeding or a mental illness proceeding against a member of their family, the other spouse had better move out of the house and get out of the way. There is simply no evidence

whatsoever that he did anything except call up the lawyer. Certainly he talked to him, certainly he talked to the judge. There is nothing whatsoever wrong with any of that. There is nothing wrong in saying that he agrees with his wife and he supported her. That simply is not unlawful, and it does not go to any unlawful purpose either, and therefore --

TRANSCRIPT, HEARING ON MOTION FOR NEW TRIAL, SEPT. 25, 1980, PP. 50-51

* * * * *

(4) Moved to disregard certain jury findings including the findings of malice and lack of probable cause and argued the trial court erroneously refused to give one of Petitioners' requested instructions. Reference Petition, p. 12 (4).

DEFENDANTS' MOTION FOR JUDGMENT AND TO DISREGARD CERTAIN SPECIAL ISSUE JURY FINDINGS AND ALTERNATIVELY FOR REMITTITUR DUE TO EXCESSIVENESS OF THE JURY'S DAMAGE FINDINGS

I.

COME NOW Defendants, Gloria Akin and Ted Akin and pursuant to Rule 301, Texas Rules of Civil Procedure, move the Court to disregard the jury's answers to special issues 1, 2, 3, 4, 5, 6,

7(1), 7(2), 9(1), 9(2), 10, 23, 24, and 25 and for cause would show:

1. There is no legally competent evidence to support the jury's answer to Special Issue No. 1.

2. The undisputed evidence establishes probable cause for the guardianship proceeding on a matter of law.

3. There is no legally competent evidence to support the jury's answer to Special Issue No. 2.

4. There is no legally competent evidence to support the jury's answer to Special Issue No. 3.

5. There is no legally competent evidence to support the jury's answer to Special Issue No. 4.

6. The undisputed evidence establishes probable cause for the mental illness proceeding as a matter of law.

7. There is no legally competent evidence to support the jury's answer to Special Issue No. 5.

8. There is no legally competent evidence to support the jury's answer to Special Issue No. 6.

VOL. II, TRIAL TRANSCRIPT, P. 179-180.

* * * * *

AMENDED MOTION FOR NEW TRIAL

COME NOW Defendants, Gloria D. Akin and Ted. M. Akin, in the above entitled and numbered cause which was consolidated heretofore with Cause No. 79-904-A, Gloria D. Akin v. George L. Dahl in the 114th Judicial District Court of Dallas County, Texas, and Cause No. 78-12590-H, Gloria D. Akin v. George L. Dahl, in the 160th Judicial District Court of Dallas County, Texas, and said Defendants, Gloria D. Akin and Ted M. Akin, hereby move for new trial in cause No. 78-11230-L and would show:

1. There is no evidence to support the jury's answer to Special Issue Number 1.

2. The jury's answer to Special Issue Number 1 is against the great weight and preponderance of the evidence and is manifestly wrong.

3. The evidence is insufficient to support the jury's answer to Special Issue Number 1.

4. The jury's answer to Special Issue Number 1 is against the conclusive evidence in this case and should, therefore, be set aside.

5. It was error for the Court to submit Special Issue Number 1 to the jury because same submitted an issue of law to the jury.

6. There is no evidence to support the jury's answer to Special Issue Number 2.

7. The jury's answer to Special Issue Number 2 is against the great weight and preponderance of the evidence and is manifestly wrong.

8. The evidence is insufficient to support the jury's answer to Special Issue Number 2.

9. The jury's answer to Special Issue Number 2 is against the conclusive evidence in this case and should, therefore, be set aside.

10. There is no evidence to support the jury's answer to Special Issue Number 3.

11. The jury's answer to Special Issue Number 34 is against the great weight and preponderance of the evidence and is manifestly wrong.

12. The evidence is insufficient to support the jury's answer to Special Issue Number 3.

13. There is no evidence to support the jury's answer to Special Issue Number 4.

14. The jury's answer to Special Issue Number 4 is against the great weight and preponderance of the evidence and is manifestly wrong.

15. The evidence is insufficient to support the jury's answer to Special Issue Number 4.

16. The jury's answer to Special Issue Number 4 is against the conclusive evidence in this

case and should, therefore, be set aside.

17. It was error for the Court to submit Special Issue Number 4 to the jury because same submitted an issue of law to the jury.

18. There is no evidence to support the jury's answer to Special Issue Number 5.

19. The jury's answer to Special Issue Number 5 is against the great weight and preponderance of the evidence and is manifestly wrong.

20. The evidence is insufficient to support the jury's answer to Special Issue Number 5.

21. The jury's answer to Special Issue Number 5 is against the conclusive evidence in this case and should, therefore, be set aside.

22. There is no evidence to support the jury's answer to Special Issue Number 6.

23. The jury's answer to Special Issue Number 6 is against the great weight and preponderance of the evidence and is manifestly wrong.

24. The evidence is insufficient to support the jury's answer to Special Issue Number 6.

VOL. II, TRIAL TRANSCRIPT, AMENDED MOTION FOR NEW TRIAL, PP. 189-191.

* * * * *

63. The trial court erred in refusing Defendants' requested instruction number 4 in that under the facts of this case such instruction was necessary to remove from the jury's mind the implication planted and cultivated by the Plaintiff that the procedures used by the Defendants in this case were evil, and the jury was required to be instructed concerning the appropriate procedure under State law in order that the jury could properly evaluate the conduct of Mrs. Akin.

VOL. II, TRIAL TRANSCRIPT, AMENDED MOTION FOR NEW TRIAL, P. 195.

* * * * *

(1) That the right of access to the courts was involved. Reference Petition, p. 12 (1).

Suits for malicious prosecution are not favored by the law and the reason is that persons should be free to imply the procedures provided by law for protection of their rights and the health and safety of their loved ones without fear of the hazards of a jury verdict. That this is so seems to be the settled and recognized law of this state as reflected in the writ refused case of Lancaster & Love v. Mueller Company, 310 S.W.2d 659 at 663 (Tex. Civ. App. 1958, error refused) wherein the court says:

[2] Suits for malicious prosecution are not favored by the law. 28

> Tex. Jur., p. 446. "The reason for the rule not favoring actions for malicious prosecution, in case of civil proceedings, is that a litigant should be entitled to have his rights determined without the risk of being sued and having to respond in damages for seeking to enforce his rights, as free access to courts of civil justice is provided for the administration of the law of the land * * *." 54 C.J.S. Malicious Prosecution, § 3, p. 955.

There is also another reason that probable cause should be held to exist in this case. Both the temporary guardianship and the mental illness commitment were brought about upon orders issued by the courts of this state after a judge had heard the evidence sufficient to authorize these preliminary actions. Unless the person relating the facts to institute those actions is shown to have been acting in fraud to bring about the actions, the court actions should be a complete shield to liability because the court has of necessity determined that probable cause exists. Lancaster & Love, Inc. v. Mueller Company, 310 S.W.2d 659 (Tex. Civ. App. 1958, error refused); Sebastian v. Chaney, 25 S.W. 691 (Tex.Sup. 1894); Deaton v. Montgomery Ward & Company, 159 S.W.2d 969 (Tex. Civ. App., error ref. w.o.m.).

IN THE TEXAS COURT OF CIVIL APPEALS, AMARILLO, APPELLANT'S (PETITIONER'S HERE) BRIEF, PP. 12-13.

* * * * *

(2) That without evidence and findings that Petitioners made less than honest and full disclosure in commencing the earlier proceedings, the finding of lack of probable cause could not be sustained and probable cause was established as a matter of law. Reference Petition, p. 12 (2).

> There is no evidence in this case that the Akins made false or misleading statements to judges or doctors or that they failed to make full disclosure of facts known to them. Apparently, the Appellee recognized that such was essential to his case because he objected to the court's charge for failure to include an issue inquiring whether Gloria Akin had made false and misleading statements to judges and doctors (S.F., Volume I, p. 1857). The court did not submit such an issue and there is no evidence to support such an issue and the institution of the mental illness proceeding and the guardianship proceeding by duly constituted authority must stand conclusive on the issue of probable cause.

IN THE TEXAS COURT OF CIVIL APPEALS, AMARILLO, APPELLANTS' (PETITIONERS' HERE) BRIEF, P. 13.

* * * * *

Appellee failed to discharge the very heavy burden of proving a negative that Mrs. Akin had no probable cause. Recognizing the difficulty of this, Appellee asserts as proof of no probable cause that, "the reasons given the Courts and doctors were either deliberate falsehoods or else left out such vital facts as to make statements made by them grossly misleading." Appellee's Brief, pp. 16-17. There is no evidence Mrs. Akin lied or intentionally omitted anything, and the evidence is clear and convincing that information from the Akins was not essential to the diagnosis of Mr. Dahl's condition. The tactics of Appellee bring to mind a quotation from Addison:

> Our disputants put me in mind of the scuttlefish, that when he is unable to extricate himself, blackens all the water about him, till he becomes invisible.
>
> Joseph Addison, The Spectator, No. 476, Sept. 5, 1912.

Appellees attempt to black the water about the issue of no probable cause and render such issue invisible by a drumfire of characterization, accusation, and cavil about motive. These things are no evidence that there was no probable cause for Mrs. Akin to act. There was plenty to raise in a reasonable mind the belief that action was justified.

Appellants respectfully pray for reversal of the trial court judgment in the malicious prosecution case in accord with the prayer in Appellants' Brief.

IN THE TEXAS COURT OF CIVIL APPEALS, AMARILLO, APPELLANT'S (PETITIONERS' HERE) REPLY BRIEF, PP. 23-24.

* * * * *

(2) An essential element of Mr. Dahl's cause of action in this case is positive proof that Mrs. Akin had no cause whatever to bring either the guardianship or mental illness proceedings. Proof of lack of probable cause in a malicious prosecution case cannot rest upon suspicion or surmise and requires more satisfactory proof than in ordinary lawsuits. Sullivan vs. O'Brien, 85 S.W.2d 1106, 1112 (Tex. Civ. App. - San Antonio 1933, writ ref'd). In Griffin vs. Chubb, 7 Tex. 302, 308 (1852) the Texas Supreme Court first recognized that:

> "The want of probable cause is a material averment, and though negative in its form and character, it must be proved by Plaintiff by some affirmative evidence. It is independent of malicious motive, and cannot be inferred as a necessary consequence, from any degree of malice which may be shown." (emphasis added)

Thus, apart from motive, surmise or suspicion, Mr. Dahl has produced no evidence to contradict or otherwise

impeach Mrs. Akin's testimony that probable cause existed at the time of the institution of the proceedings.

IN THE TEXAS COURT OF APPEALS, AMARILLO, APPELLANT'S SUPPLEMENTAL MOTION FOR REHEARING, P. 5.

* * * * *

(3) On rehearing, that the Court of Appels' opinion had a chilling effect on access to the Courts. Reference Petition, p. 13 .

4. The opinion of the Court of Appeals creates a chilling effect on access to the courts, thereby discouraging family members from protecting relatives through judicial intervention.

Of final and compelling concern are relevant considerations of public policy which may well rise to constitutional dimensions in the context of this appeal. If, as the Court suggests, the relatives of an elderly person be subjected to draconian damages for wrongful commitment merely upon proof that the person was competent at a later point in time, then it is respectfully submitted that virtually any family member would be subject to catastrophic liability for attempting to intervene to protect a loved one... The gravamen of this Court's holding is that in such circumstances, if the older person is ultimately found to be competent by a jury of sympathetic peers, the

family members may be subject to millions of dollars in damages. In view of this opinion, we should not later be surprised to see that very few children and very few family members will intervene to attempt to help an obviously ill person who may not know his own mind and cannot protect himself from the forces of modern society. In such a circumstance the purposes of the law and the parens patriae concept will be frustrated if not destroyed.

Finally, the holding of this Court implies the significant infringement upon an individual's access to the courts. Mrs. Akin as well as Mr. Dahl have constitutionally protected rights which include the right to access to the court for a judicial determination of disputed fact issues. The standard of malicious prosecution employed by this Court effectively imposes strict liability upon Mrs. Akin, not for the absence of probable cause in initiating the guardianship and mental illness proceedings, but instead for an error in judgment later determined by a jury of laymen without regard to the overwhelming testimony to the contrary.

IN THE TEXAS COURT OF CIVIL APPEALS, APPELLANT'S SUPPLEMENTAL MOTION FOR REHEARING, PP. 9-10.

* * * * *

(1) The resulting chill on the use of the courts. Reference Petition, page 13.

The inference of want of probable cause drawn from the actual finding of competence is especially dangerous. The law not only disfavors malicious prosecution actions; it makes available guardianship and civil commitment proceedings to protect persons against themselves. It would be a most dangerous precedent to subject those who institute such proceedings to the sanctions of this disfavored test solely upon a showing that the subject of their - and the state's - concern is ultimately able to fend for himself. Persons who have probable cause to seek civil commitment of a close relative may deem it more prudent not to run the risk of dangers which would flow from the mere denial of their petition. The consequences in perhaps borderline cases may be devastating.

IN THE TEXAS SUPREME COURT, (PETITIONERS' APPLICATION FOR WRIT OF ERROR, P. 11.

* * * * *

As Dean Green has explained, the plaintiff in a malicious prosecution action has an "uphill battle" because citizens should be encouraged "to seek the protection of their interests and the interests of the community in the courts without fear of being themselves subjected to the hazards of litigation." Green, Judge and Jury, Ch. 12 (Malicious Prosecution), pp. 338-339 (1930) ("Strict uniform and expert rulings are a premium in these case. Judges play a dominant role in handling them. "Question of law" and "questions of fact"

take on different hues here from that found in most other case.")

IN THE TEXAS SUPREME COURT, (PETITIONERS') BRIEF PURSUANT TO RULE 496, P. 26.

* * * * *

Surely the law should not inhibit family members, those most likely to be subject to a charge of improper motive, but also those most likely to be interested in the welfare of other family members.

IN THE TEXAS SUPREME COURT, REPLY TO RESPONDENT'S REPLY TO SUPPLEMENTAL MOTION FOR REHEARING, P. 6.

* * * * *

Heretofore probable cause has been an objective standard applied to determine whether facts and circumstances known to an individual were sufficient to evoke belief in a reasonable mind. In other words, could a reasonable mind believe? Now probable cause is changed to a subjective standard whereby the question becomes whether under all the known facts and circumstances, or facts and circumstances that should have been known (whatever that may mean in a particular case), the particular individual involved should have believed. The former standard achieved some degree of uniformity and predictability as a test of law, and insured open access to the courthouse. The new standard achieves inconsistency and requires any client to be advised that he acts at peril because a jury may decide such cases on the

basis of what they think right rather than having a legal determination made on whether there is evidence that is sufficient to excite belief in a reasonable mind. The instant case is a good example.

IN THE TEXAS SUPREME COURT, PETITIONERS' SUPPLEMENTAL MOTION FOR REHEARING, PP. 4e-4f.

* * * * *

Thus, regardless of the evidence available to the defendant at the time he or she acts, the existence of probable cause is determined not on whether there was evidence sufficient to satisfy the probable cause standard, but solely on the question of whether there was any evidence tending to show a contrary conclusion-competency. The protection of a probable cause standard to guarantee access to the courts is completely destroyed and review of the evidence available to the actor at the time of institution of proceedings from a legal sufficiency standpoint is cut off.

IN THE TEXAS SUPREME COURT, PETITIONERS' SUPPLEMENTAL MOTION FOR REHEARING, P. 45.

* * * * *

This Court held that the expert testimony of the three physicians, Dr. Woods, Dr. Grigson and Dr. Howard, may not be considered as evidence of probable cause since those physicians first examined Mr. Dahl after the proceedings were in progress but before they had been

concluded. The effect of the holding is that the only competent evidence as to Mr. Dahl's mental condition which is available to determine the existence of probable cause is not admissible because it was obtained and presented in the only time and manner Texas law would allow. Petitioners sincerely doubt that this Court has seriously intended to make that holding which creates a manifest injustice on anyone seeking to help a family member.

Such a holding is not only unfair but defies logic. Why should the testimony of the statutorily required physicians which corroborates or disputes the belief of the initiator that guardianship is warranted be excluded merely because it is obtained after the proceedings are in progress but before they are completed?

IN THE TEXAS SUPREME COURT, PETITIONERS' SUPPLEMENTAL MOTION FOR REHEARING, P. 15.

* * * * *

This case presents a particularly tragic example of the misuse and abuse of a malicious prosecution suit involving institution of civil proceeding relating to the competency of a beloved family member. Given the nightmare which has befallen the Akin family, it is small wonder that this Court traditionally approved the view that:

> "...suits for malicious prosecution are not favored by the law...the

> reason for the rule not favoring actions for malicious prosecution, in case of civil proceedings, is that a litigant should be entitled to have his rights determined without the risk of being sued and having to respond in damages for seeking to enforce his rights, as free access to courts of civil justice is provided for the administration of the law of the land..."

Lancaster & Love, Inc. v. Mueller Co., 310 S.W.2d 659, 633 (Tex. Civ. App.-Dallas 1958), writ ref'd). The errors of law which have led to the occurrence of this egregious injustice should be corrected before they are allowed to form the erroneous basis for the reoccurrence of similar tragedies in the future.

This is also a case of tremendous importance to the public policy of this State and to the mental health and physical safety of its citizens. Prior to this Court's announcement of its opinion, the law encouraged concerned family members to seek access to the courts for assistance in determining the competency of elderly or handicapped citizens in guardianship pr mental illness proceedings. The purpose of the law was to protect the personal and financial estates of citizens whose faculties might have been compromised and thus could no longer effectively care for themselves. If Gloria and Ted Akin are held liable for

> relying upon the undisputedly valid medical opinion of four independent physicians that a jury is free to disbelieve, it is submitted that no competent attorney could ever under any circumstances permit or allow a client no matter what their concern for the welfare of another to seek a mental illness or guardianship proceeding under the laws of this State.

IN THE TEXAS SUPREME COURT, PETITIONERS' SUPPLEMENTAL MOTION FOR REHEARING, PP. 30-31.

* * * * *

(2) The existence of probable cause as a matter of law and the failure of proof that Petitioners had made falsehoods of any sort in commencing the prior proceedings and thus the failure of the record to support the finding, of lack of probable cause. Reference Petition, p. 13 (2).

> In disposing of the sufficiency of the evidence points in the appeal of the guardianship case, the Court of Appeals concluded, 590 S.W.2d at 198:
>
> > After considering and weighing all of the evidence and extending due deference to the jury's prerogative, it cannot be held that the jury's finding is so against the

> great weight and preponderance of the evidence as to be manifestly wrong and unjust. In arriving at this determination, it is recognized that the jury might have, and Mrs. Akin stresses the jury should have, reached the opposite finding from the evidence;...

The question in this appeal is whether that medical opinion, and those facts known to Mrs. Akin, which might have supported a jury verdict that Mr. Dahl lacked competency, are sufficient to establish probable cause for Mrs. Akin having brought the guardianship and mental illness proceedings. Unimpeached evidence is in the record that Mr. Dahl suffered from hardening of the arteries; that there had been organic changes in his brain; that he had begun to demonstrate unusual anger and outbursts of temper which had not previously been typical; that these outbursts were sufficient to alarm his administrative assistant, and his personal physician; that he had exhibited changes in attitude to certain of his employees.

IN THE TEXAS SUPREME COURT, APPLICATION FOR WRIT OF ERROR, PP. 6-7.

* * * * *

Lack Of Probable Cause Cannot Be Inferred From Proof Of Malice.

The case law makes it clear that a lack of probable cause cannot be inferred from evidence of

malice (motivation), see, Parker v. Dallas Hunting & Fishing Club, 463 S.W.2d 496, 500 (Tex. Civ. App.-Dallas 1971), no writ). ("[t]he want of probable cause can never be inferred from proof of malice").

On page 14 of the Court of Appeals' Opinion, immediately preceding the conclusion that some evidence of want of probable cause sufficient to raise a question for the jury's determination of the probable cause issues was presented, the Opinion states the following:

> Of importance for the jury's consideration was the evidence bearing on the question whether Mrs. Akin did or did not in good faith make a full and fair disclosure of all facts and circumstances known to her in bringing the guardianship and mental health proceedings. See, e.g., Eans v. Grocer Supply Co., Inc., 580 S.W.2d 17, 21 (Tex. Civ. App.-Houston [1st Dist.] 1979, no writ).

First of all, there is no evidence of a failure to make a good faith disclosure.* However, evidence bearing on the question whether Mrs. Akin did or did not in good faith make a full and fair disclosure of all of the facts and circumstances known to her in bringing the guardianship or mental illness proceedings, [see] Opinion at p. 14] could be relevant to the issue of malice...

The Court of Appeals said (opinion, p. 20):

> The jury made findings, which we have upheld, that implicitly negate an honest and full disclosure of the facts and circumstances known when the guardianship and mental illness proceedings were brought.

The inference is simply not permissible and cannot be considered in gauging the legal sufficiency of the evidence to support the jury's findings of a lack of a probable cause.

IN THE TEXAS SUPREME COURT, APPLICATION FOR WRIT OF ERROR, PP. 12-13.

* * * * *

Apparently, the Court of Appeals and this Honorable Court concluded that since the jury apparently did not believe Mrs. Akin, that there is evidence that she lacked probable cause. This Honorable Court in its opinion at page 4 stated:

> "Not only may the trier of facts look to evidence relative to the motivation and beliefs of the party instigating the proceedings, but the trier of fact may also look to the good faith or lack thereof demonstrated by the prosecutor of the action." [Emphasis added.]

> This analysis of necessity hinges upon whether the jury's disbelief of Mrs. Akin can somehow be converted into affirmative evidence that she lacked probable cause. Petitioners submit that it cannot.

IN THE TEXAS SUPREME COURT, PETITIONERS' SUPPLEMENTAL MOTION FOR REHEARING, P. 28.

* * * * *

> This argument, which assumes without evidence that the Akins had no idea of the truth or falsity of their allegations, departs entirely from an objective standard of whether the unrebutted facts known to the Akins were sufficient to excite belief of mental illness in a reasonable mind. If fact, the argument gets back to the real problem, must the person who files an action be right in order to escape a malicious prosecution judgment - or must the facts be sufficient only to excite belief in a reasonable mind. What Respondent argues is that if the jury does not believe the Akins, the jury may infer that the Akins did not believe, therefore the Akins are accountable for what the jury infers the Akins did not believe.
>
> Petitioners pray this Court not to permit this inference upon inference approach particularly where it begins with what has heretofore been wholly impermissible inference, that is, that the jury's failure to believe the Akins may be converted into evidence against them, in other words, may be permitted to support an inference that they lied. This is contrary to

Texas & N.O.R. Co. v. Grace, 188 S.W.2d 378, 380 (Tex. 1943) and Texas & N.O.R. Co. v. Burden, 203 S.W.2d 522, 530 (Tex. 1947).

IN THE TEXAS SUPREME COURT, REPLY TO RESPONDENT'S REPLY TO MOTION FOR REHEARING, P. 2.

* * * * *

(3) On rehearing The Texas Supreme Court's improper use of a negligence standard to determine lack of probable cause. Reference Petition, p. .

A. The Appropriate Standard of Probable Cause in Civil Cases is Facts Known to Mrs. Akin Not What She Might Have Known

(1) This Court has stated at p. 4 that:

> "It is proper for the trier of fact to consider all evidence which the prosecutor knew or should have known relative to the condition of the plaintiff and upon which the prosecutor based or should have based his action." (Emphasis added.)

Petitioners submit that this applies a negligence standard to probable cause and is contrary to the very definition of probable cause as approved by this Court in its Opinion, p. 5, as:

> "the existence of such facts and circumstances as would excite belief in

> a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted."
>
> Thus, by the long-standing approved definition of probable cause, the test is "facts within the knowledge of the prosecutor," not what the prosecutor "should have known". This Court cites no authority for this extraordinary statement applying negligence to probable cause in the context of a suit for malicious prosecution and, indeed, none exists. This holding is flatly wrong.

IN THE TEXAS SUPREME COURT, PETITIONERS' SUPPLEMENTAL MOTION FOR REHEARING, P. 24.

* * * * *

Form No. 647-Rev.75

HISTORY OF PRESENT MENTAL ILLNESS

*George Leighton Dahl	*W	*S	*84
NAME OF PATIENT	RACE	SEX	AGE

PLEASE ANSWER THE FOLLOWING QUESTIONS IN COMPLETE DETAIL. IF YES, GIVE EXAMPLE.

1. Describe the symptoms that were noticed indicating that there was something wrong with the patient's mind, e.g., lack of sleep

depression, abnormal talk of religion, hearing voices, seeing visions, believing someone or something is persecuting him/her.

*His entire personality has changed. He suffers emotional outbursts without provocation. He is turning against his family and people who have been close to him. He lacks the ability to reason and his poor recall for recent events. He suffers from arteriosclerosis, but refuses to see his doctor of internal medicine for a physical. He fails to regularly take his prescribed medicine. He recently fired his trusted maid of forty-six (46) years and accused her of stealing.

2. Is he/she ever physically violent, or does he/she make physical threats? (If he/she has ever harmed anyone, explain).

*Not to my knowledge.

3. Has he/she ever attempted or threatened suicide? (If he/she has ever harmed themselves, explain).

*No - however by failing to take his medication may result in the same thing.

4. Does he/she neglect his/her personal appearance?

*Yes. He has changed from a dapper dresser to one who wears the same clothes including underclothes for days to weeks at a time. These clothes that he choose are old and dishevelled.

5. Does he/she use alcohol or narcotics, and how much?

*Not to my knowledge.

Dated this the *25th day of *April, 1978*.

*368-4246	*368-4166	*/s/ Gloria Akin
Home ph.no.	Wk.ph.no.	APPLICANT

*Daughter
RELATION TO PATIENT

Subscribed and sworn to before me this the *25 day of *April, 1978*.

*/s/ Galen Samford
Notary Public, Dallas County, Texas

FILED
APR 25 1978
L.E. MURDOCH, CLERK
County Court,
Dallas County, Texas
By */s/ Louise Ellis

Plaintiff's
Exhibit
No. 21

*Indicates information was handwritten.

(a) Any health or peace officer, who has reason to believe and does believe upon the representation of a credible person in writing, or upon the basis of the conduct of a person or the circumstances under which he is found that the person is mentally ill and because of his mental illness is likely to cause injury to himself or others if not immediately restrained, may upon obtaining a warrant from any magistrate, take such person into custody, and immediately transport him to the nearest hospital or other facility deemed suitable by the county health officer, except in no case shall a jail or similar detention facility be deemed suitable unless such jail or detention facility is specifically equipped and staffed to provide psychiatric care and treatment, and make application for his admission, pursuant to the warrant of the magistrate. Such person admitted upon such warrant may be detained in custody for a period not to exceed twenty-four (24) hours, unless a further written order is obtained from the County Court or Probate Court of such county, ordering further detention. Provided, however, that should the person be taken into custody after 12:00 o'clock noon on Friday, or on a Saturday or Sunday, or a legal holiday, then the twenty-four-hour period allowed for obtaining the court order permitting further detention shall begin at 9:00 o'clock a.m. on the first succeeding business day. ....

TEX.REV.CIV.STAT.ANN.art. 5547-27
(VERNON'S 1983 SUPP.)

* * * * *

A sworn Application of Temporary Hospitalization of a proposed patient may be filed with the county court of the county in which the proposed patient resides or in which the proposed patient is found or in which the proposed patient is hospitalized by court order. The Application may be made by any adult person, or by the county judge, and shall state upon information and belief that the proposed patient is not charged with a criminal offense, that he is mentally ill, and that for his own welfare and protection or the protection of others he requires observation and/or treatment in a mental hospital. An Order transferring a criminal defendant against whom all charges have been dismissed to the appropriate court for a hearing on temporary commitment pursuant to Section 7 of Article 46.02, Code of Criminal Procedure, 1965, shall state that all such charges have been dismissed and the Order shall serve as the Application for Temporary Hospitalization of the proposed patient. Acts 1979, 66th Leg., p. 790, ch. 351, §1, eff. Aug. 27, 1979.

TEX.REV.CIV.STAT.ANN.art. 5547-31
(VERNON'S 1983 SUPP.)

* * * * *

A sworn Application of Temporary Hospitalization of a proposed patient may be filed with

the county court of the county in which the proposed patient resides or is found. The Application may be made by any adult person, or by the county judge, and shall state upon information and belief that the proposed patient is not charged with a criminal offense, that he is mentally ill, and that for his own welfare and protection or the protection of others he requires observation and/or treatment in a mental hospital. An Order transferring a criminal defendant against whom all charges have been dismissed to the appropriate court for a hearing on temporary commitment pursuant to Section 7 of Article 46.02, Code of Criminal Procedure, 1965, shall state that all such charges have been dismissed and the Order shall serve as the Application for Temporary Hospitalization of the proposed patient. Acts 1977, 65th Leg., p. 1470, ch. 596, § 4, eff. Sept. 1, 1977.

TEXAS STATUTES AND CODES, art. 5547-31 (WEST'S 1977 SUPP.)

* * * * *

A proceeding for the appointment of a guardian shall be begun by written application filed in the court of the county having venue thereof. Any person may make such application. Such application shall state:

(a) The name, sex, date of birth if a minor, and residence, of the person for whom the appointment of a guardian is sought; and

(b) If a minor, the names of the parents and next of kin of such persons, and whether either or both of the parents are deceased; and

(c) A general description of the property comprising such person's estate, if guardianship of the estate is sought; and

(d) The facts which require that a guardian be appointed; and

(e) The name, relationship, and address of the person whom the applicant desires to have appointed as guardian; and

(f) Whether guardianship of the person and estate, or of the person or of the estate, is sought; and

(g) Such other facts as show that the court has venue over the proceeding.

Acts 1955, 54th Leg., p. 88, ch. 55, eff. Jan. 1, 1956.

TEX. PROB. CODE ANN. §111 (VERNON'S 1980)

END OF DOCKET